IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 32

UNITED STATES OF AMERICA, *Appellant*

v.

ROBERT M. HARRISS, RALPH W. MOORE, TOM LINDER, AND NATIONAL FARM COMMITTEE

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR RESPONDENT ROBERT M. HARRISS

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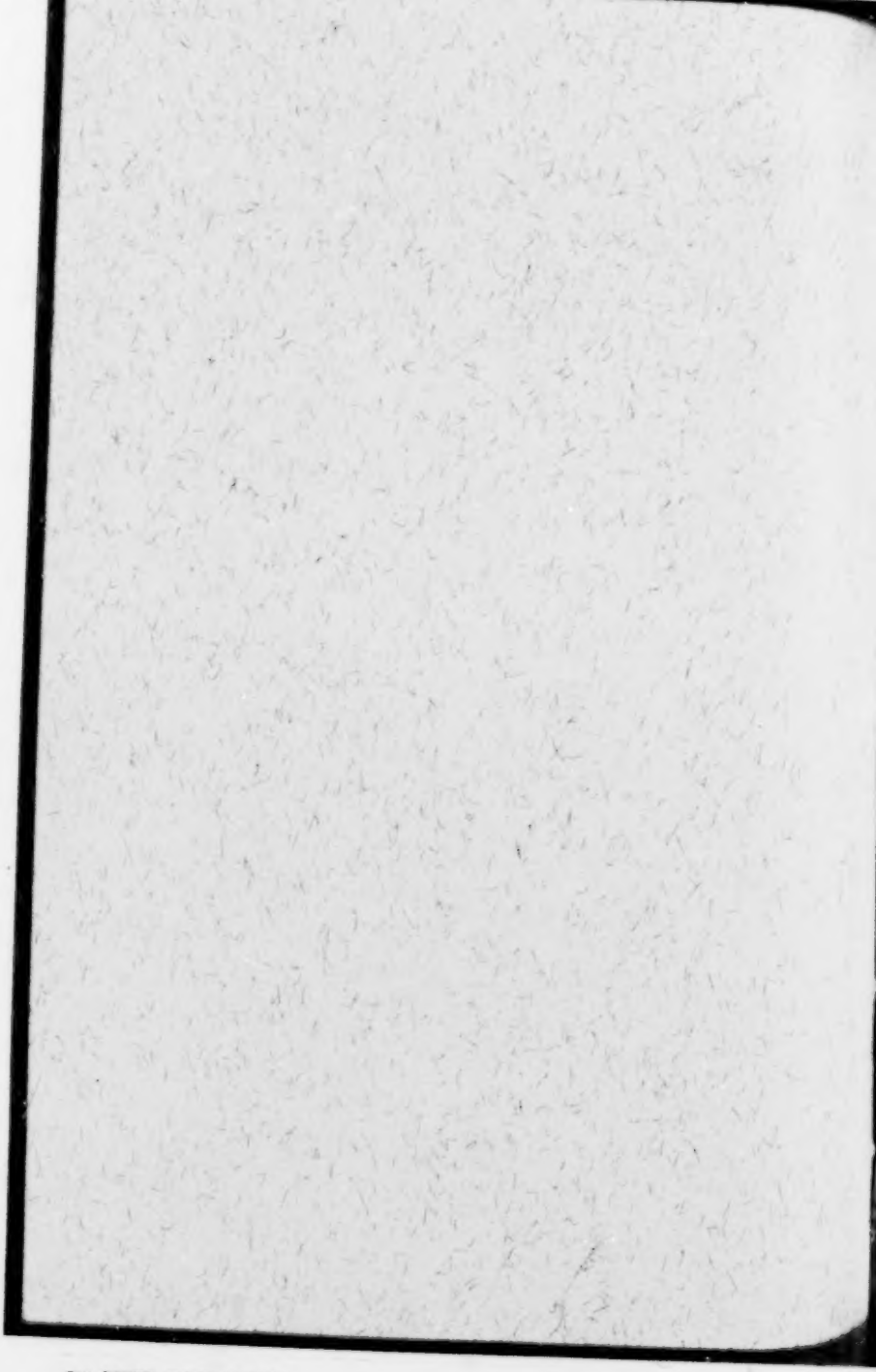

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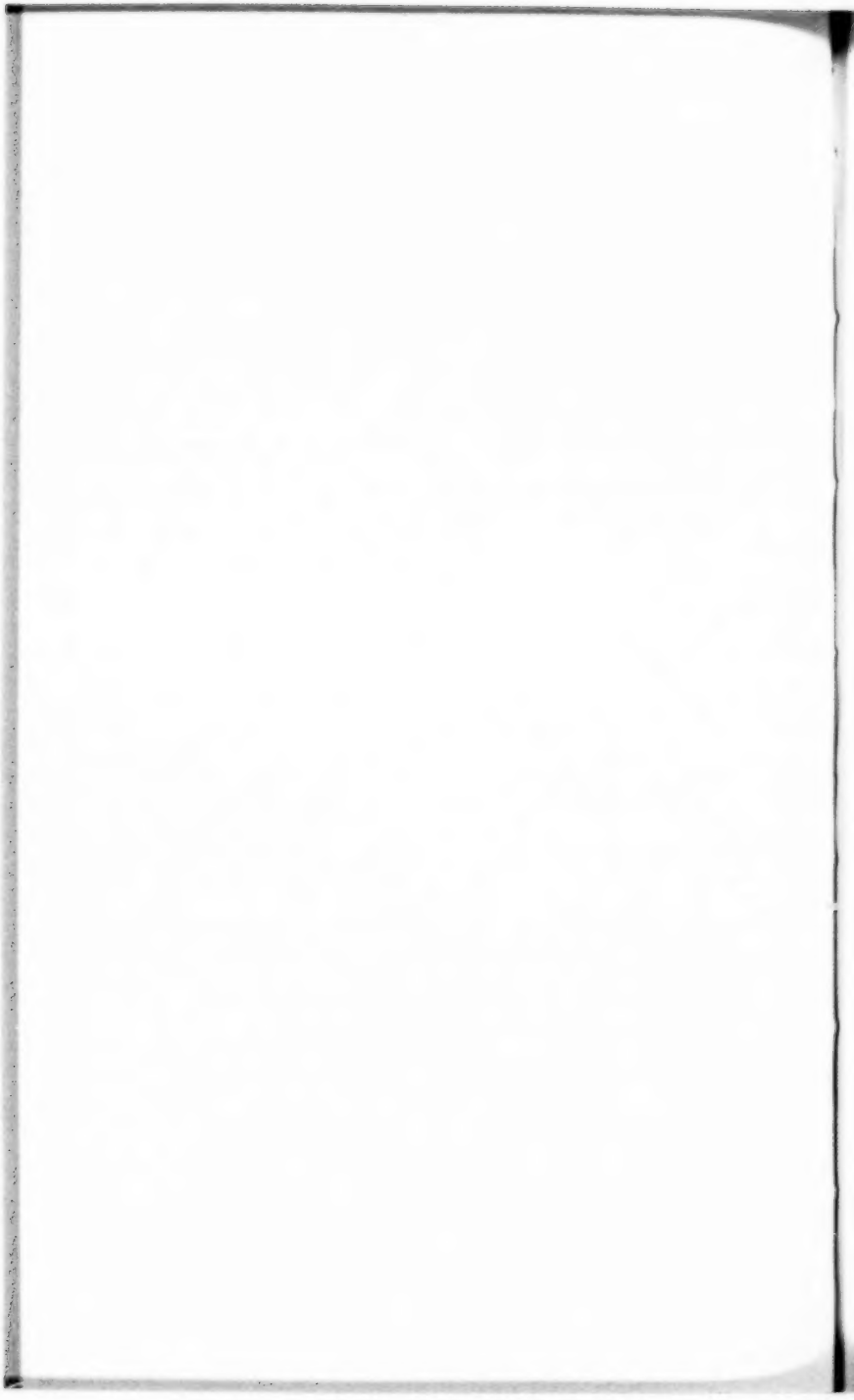

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OPINION BELOW

The opinion of the District Court dismissing the information (R. 39-40) is reported at 109 F. Supp. 641.

JURISDICTION

Jurisdiction of this Court is conferred by 18 U.S.C. § 3731.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the indefiniteness and the ambiguities appearing on the face of the Act render it unconstitutional for violation of the Fifth and Sixth Amendments.

2. Whether the Act on its face unconstitutionally abridges the freedoms guaranteed by the First Amendment.

3. Whether the penalty provisions of Section 310(b) are unconstitutional on their face through their abridgement of First Amendment freedoms and operate in consequence to invalidate the Act in its entirety.

STATUTE INVOLVED

The full text of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U.S.C. 261-270, is set forth in the Government's brief, at pages 89-95.

COUNTERSTATEMENT

We regard the Government's summary of the Information and the holding of the District Court (Government's brief, pp. 3-14) to be adequate except in the respects now stated.

As shown hereafter (pp. 14-20) the jurisdiction of this Court under the Criminal Appeals Act is limited, in the circumstances of this case, to determining whether the statute is unconstitutional on its face and as Congress has written it. Under the Criminal Appeals Act the Court cannot, as the Government urges it to do in its brief, narrow the scope of its constitutional determination solely to the particular applications of the Lobbying Act which the Information seeks to make by its accusations

against these defendants. To the contrary, the Court can look to the charges of the Information only as an aid to its proper determination of whether the Act is unconstitutional *on its face* and as applied in *all* cases—whether in this case or in any future case that might otherwise arise.

Hence in this brief we refer to specific charges of the Information only for that limited purpose, and with that limited purpose in view we desire to emphasize at the outset that the defendant Harriss, on whose behalf the present brief is filed, stands under the charges of the Information in a different category from any of the other defendants, since he is the *only* defendant whom the Government has *not* charged with having solicited, collected or received any money for the purpose of influencing legislation. Harriss, on the contrary, in Counts VI and VII of the Information (R. 14-17) is charged only with *spending money* for legislative purposes. Harriss for that reason moved for a dismissal in the District Court on the additional ground that the statute on its face had no application to such expenditures (R. 34-36), but the District Court did not pass upon this ground of the motion, and dismissed the charges against him instead on the ground, as he had also urged, that the Act was unconstitutional on its face and in its entirety.

Here we regard such a charge against Harriss to be of importance for the reason that this Court can in the light thereof consider the constitutionality of the Lobbying Act on its face in the knowledge that the arm of the Government charged with the enforcement of the statute has construed it to mean, and has based prosecutions on that construction, that any one spending money to "influence" "legislation" "directly or indirectly", is liable to the criminal penalties of the Act if he has not registered and filed the required reports. The preposterous consequences of this construction and their signifi-

cance as an additional factor to demonstrate the unconstitutionality of the Lobbying Act upon its face, are discussed hereinafter at pp. 45-50.

The Government's statement of the holding of the District Court appearing on page 13 of its brief appears somewhat inadequate, and in one respect is in error.

The circumstances in which the District Court applied the decision of the Three-Judge Court in *National Association of Manufacturers* v. *McGrath*, 103 F. Supp. 510, (hereinafter referred to as the *N.A.M.* decision) are clearly stated in the lower Court's opinion (R. 39) as follows:

> The Court feels that that case is at least stare decisis, if not res judicata.
>
> To be sure, the judgment in that case was set aside and the complaint dismissed by the Supreme Court, but merely on the ground that the case had become moot during the progress of the litigation. The Court did not either affirm or reverse the decision of this Court holding this statute unconstitutional, but merely failed to pass on this point. It may well be that the judgment in that case, as I stated before, is not res judicata, but the opinion is stare decisis, and will be followed by the Court.

Since this *N.A.M.* decision, invalidating (among other sections) Section 305, under which the defendant Harriss is charged, was held by the Court to be controlling in the present case, we are for convenience including the full text thereof as an appendix to this brief (*infra*, pp. 91-98), and page citations thereto will hereinafter be to that appendix and not the official report.

Section 307 of the Act (Government's brief, pp. 92-93) is entitled "PERSONS TO WHOM APPLICABLE", and by its express terms it fixes the applicability of the entire "title", i.e., of the entire Lobbying Act. The Three-Judge Court, referring to this section as (*infra*,

p. 93) "the vital provision of the pertinent portions of the statute," proceeded to examine its terms in order to determine whether they were so vague and indefinite as to stand in violation of the Fifth Amendment. It said (*infra*, p. 96) that "[t]he clause, 'to influence, directly or indirectly, the passage or defeat of any legislation by the Congress' is manifestly too indefinite and vague to constitute an ascertainable standard of guilt" and that "the conclusion is inescapable that Sections 303 to 307 are invalid." It said further (*infra*, p. 97) that the term "principal purpose" in the same section "is likewise subject to the same criticism." It concluded, not merely as the Government states (on p. 13 of its brief) that Section 305 is therefore unconstitutional, but rather said (*infra*, p. 97):

> We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Next, the Three-Judge Court did not characterize the penalty provisions of Section 310(b) as "the prohibition of lobbying," as the Government seems to assert, but referred to this penalty section as follows (*infra* p. 97):

> Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than $5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a Committee of Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.

The Court concluded (*infra*, p. 98):

> The penalty provision of the Act * * * manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional.

Finally, this Court should be advised at the outset that the Government's present argument which seeks to restrict review to the charges of the Information, is being advanced in this Court for the first time. In the District Court, the Government sought to defend the statute only on its face, and as Congress had written it. And it was on its face that the District Court held the Act unconstitutional in its entirety.

SUMMARY OF ARGUMENT

Under the Criminal Appeals Act this Court's only jurisdiction is to determine the constitutionality of the Lobbying Act on its face. This Court's determination cannot be restricted merely to the constitutionality of specific applications of the Act which are sought to be made by the present Information. Even in the absence of the jurisdictional requirements enjoined upon the Court by the Criminal Appeals Act, the Court would yet be called upon in this case under its own settled pronouncements, to determine constitutionality on the face of the Act. For the Lobbying Act by its very existence and without reference to any particular applications of the pending Information, operates by virtue of its overhanging and pervasive threat of the direst penalties, including the mandatory deprivation of inviolable civil rights, as a direct and very real restraint upon the exercise of rights guaranteed by the First Amendment. But here the Criminal Appeals Act makes it mandatory upon

the Court to consider the constitutionality of the Act upon its face, and the Government in urging the Court to narrow its determination to the specific charges of the Information is by the same token urging the Court unlawfully to transgress the proper boundaries of its statutory jurisdiction.

The first respect in which The Lobbying Act violates the Constitution is through its failure, by reason of its vagueness and ambiguities, to meet the standards of definiteness imposed by the Fifth and Sixth Amendments. A criminal statute, to avoid constitutional infirmity, must be sufficiently clear and definite to be understood by men of ordinary intelligence, and by the juries who are to try them, both in respect of its application and requirements. And where, moreover, a criminal statute such as this sets about to restrict the exercise of First Amendment rights, the requirements of statutory specificity are considerably more exacting than where First Amendment rights are not involved. This is because the very doubts and ambiguities in the statutory language themselves act *in terrorem* to restrain the free exercise, by the persons whom they threaten, of their constitutional liberties.

The Lobbying Act is heavily fraught with highly perplexing ambiguities raising grave doubts as to its applicability and requirements, and since these doubts arise respecting important terms and clauses employed throughout its operative parts, fatal vagueness in any of the respects hereafter pointed out should be sufficient of itself to nullify the Act in its entirety.

As one example, the statutory definition of "~~lobbying~~ legislation" can convey no ascertainable meaning to a person of ordinary intelligence since its inclusion of "any matter which may be the subject of action by either House" indicates in context that it applies to matters neither pending nor proposed but which may come up for con-

sideration by Congress at some time in the unforeseeable future. Hence one receiving contributions to advance a cause or program not presently pending or proposed in Congress might later find himself to have been in violation of the Act if his legislative prophesies were wrong. Such uncertainties of themselves act as a present restraint upon the free discussion of practically any matter of general interest, for Congress might in the future legislate about anything under the sun. The painful exertions of the Government's brief to say something in defense of this definition, and the frivolous character of what it says, of themselves afford a demonstration that this definition of "legislation" is largely incomprehensible and, since it pervades the Act, renders the statute bad in its entirety.

As a second example of the fatal uncertainties of the statute, the term "to influence, directly or indirectly, the passage or defeat of any legislation" is devoid of meaning, and the District Court so held, and enumerated a number of activities—all beyond the constitutional sphere of Congressional regulation—to which this language might be applied. While the Government erroneously argues that the scope of this Court's review is confined to considering the constitutionality only of the applications of the statute which the Information seeks, and argues further that the Information is limited to charges of soliciting or approaching Congressmen in person, or of urging others to write to their Congressmen about legislation, its descriptions of the Information are squarely belied by the charges of the Information itself. The Information repeatedly charges it to be a violation of the Act merely to attempt to influence a private individual's thinking on legislation, even where no Congressman is approached, or no one is urged to write to his representatives in Congress. Indeed, the Information is largely cast upon the theory that the Act applies to those ef-

forts to mold public opinion which this Court indicated in *United States* v. *Rumely*, 345 U.S. 41, 46, 47 would raise serious doubts of constitutionality, and which the Court of Appeals in *Rumely* v. *United States*, 197 F. 2d 166, flatly declared to be in violation of the First Amendment. The fatal vagueness of the clause "to influence, directly or indirectly" is even worse compounded by its reference to "legislation", which latter term itself is meaninglessly defined, as already pointed out.

As a further instance, the terms "principally to aid", and "principal purpose" are fatally vague and indefinite; and "principal purpose" was condemned by the District Court as an additional ground for holding the statute bad upon its face. Federal and state courts which have construed the word "principal" unanimously agree that its vagueness is such as to nullify any statute or contractual provision in which it may be included. And in attempting to defend this statutory language the contentions of the Government's brief again are of such character as to demonstrate perhaps more strongly than any other consideration herein mentioned the unintelligible nature of the term.

Again by its terms Section 307 fixes the applicability of the "of this title" i.e., the Lobbying Act in its entirety, including every section thereof. It is limited to persons who *receive* money. Section 305 calls for registration and filing by anyone who *receives* or *spends* any money for the purposes referred to in Section 307. We should have thought it obvious that since Section 307 is in terms controlling over all other sections, 305 must be limited to expenditures by those who have already received money as required by 307; and in the District Court we urged dismissal on that additional basis. But the Government takes the position that instead of 305's being subject to 307, the opposite is the case, with the result that the defi-

nition of applicability of the Act in Section 307 is read entirely out of the statute, or at least to the extent that it might operate to govern the application of either Section 305 or 308 or any other section. We do not believe that any man of ordinary intelligence would have thought of such construction, but the fact remains that the enforcement policy of the Justice Department is committed to that construction on the record of the present case. We say that construction is wrong, but if the Department is right this statute must apply not merely to the charges against Harriss but also to every unregistered member of a labor union, every unregistered farmer who belongs to the National Grange, every unregistered contributor to the Red Cross, every unregistered lawyer who belongs to a bar association, and (since *de minimis* is not available, see *infra*, pp. 70-71) any person who spends the price of a telegram or a postage stamp to communicate with his representatives in Congress.

Thus the prosecution against Harriss prefigures the hideous consequences to the American people which may be expected if the Government should here obtain judicial validation of the Act.

There are further numerous ambiguities and contradictions in the statute, and as another instance Section 305 literally requires a person to report *all* receipts and *all* expenditures without limit as to their legislative purposes or any other purposes, and hence it literally, and we think inescapably, calls for the most trivial, the most confidential and irrelevant financial details of a person's life regardless of their relationship to lobbying or legislation; indeed a number of those who have filed, according to Chairman Buchanan, rather than to risk the penalties of the Act, are trying to file that kind of information.

The Lobbying Act, moreover, clearly violates the prohibition of the First Amendment that "Congress shall

make no law * * * abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These First Amendment freedoms are of equal stature and sanctity and are the most inviolable of all the rights guaranteed under the Constitution. They may be restricted by the Congress only in the event of a clear and present danger of a substantial public evil. The rational relationship between evil and remedy considered adequate to support other legislation is not sufficient in the case of statutes that restrict First Amendment freedoms and here the Court has the duty of determining the necessity for the restrictions sought to be imposed.

Under these principles the Lobbying Act manifestly stands on its face in violation of the prohibitions of the First Amendment.

The Lobbying Act goes too far in restricting First Amendment rights. This the Government does not deny; instead, with whimsical irrelevancy, it devotes many pages of its brief to pointing out what it thinks is covered "*at the least.*" Above all else the worst feature of the statute is its restriction of the very efforts to mold and influence public opinion which Judge Prettyman declared unconstitutional in *Rumely* v. *United States,* 197 F. 2d 166, and concerning which this Court expressed its own serious doubts in affirming his decision on appeal (*United States* v. *Rumely,* 345 U.S. 41, 46, 47). The language of the Act, its construction by the Congress, by the District Court in the *N.A.M.* decision, by the Buchanan Committee and by the Government in the *Rumely* case, nay by the explicit charges of the present Information, all confirm the application of the statute to any effort to mold the public mind on "any * * * matter which may be the subject of action by either House." The irrelevant contention of the Government, incidentally,

that requesting others to write their Congressmen about legislation was included within this Court's definition in the *Rumely* case of "lobbying" in its commonly accepted sense, is in our opinion advanced without foundation, and scarcely falls short of a perversion of the statement of this Court. And the Government's pretended distinction between advocates of public causes who ask their audiences to write to their Congressmen and those who do not, boils down in its context and upon analysis, to the simple proposition that *all* advocates of public causes, whether or not they ever approach a Congressman themselves, are subject to the Lobbying Act.

The Lobbying Act thus visits with criminal penalties practically every exercise of the freedoms of speech, press and assembly, as well as the right to petition the Government, which the First Amendment guarantees. It makes not the slightest distinction between open, honest and direct activity, on the one hand, and corruption, deceit, and undercover practices, on the other. Nor does it make the slightest distinction between those who solicit Congressmen personally, and those who never approach a Congressman but only seek to influence their neighbors. It applies to all who would exercise their First Amendment rights in connection with legislative matters, without regard to the nature, the magnitude or the triviality of their activities. Since it restricts a multitude of such activities which could not possibly present any clear and present danger to the legislative process, but are, to the contrary, the life's blood of the healthy functioning and even of the ultimate survival of our democratic system, it violates the First Amendment on its face, and this Court should strike it down.

It is no answer to say that this is a mere "disclosure statute" and to pretend that in any event the registration and filing requirements are not especially burdensome. The Government confines its attention to the re-

straints imposed upon those who have already complied, and it carefully eschews all reference to the blighting effect of the criminal penalties upon those persons *who have not* filed. People are repelled from filing both by the oppressive details of the information exacted by the statute, and by the stigma attached in the public mind to the concept of a "registered lobbyist." And having chosen not to file, many people will remain silent on legislative matters in preference to facing the threat of fine, imprisonment, and the mandatory deprivation of First Amendment freedoms which Section 310(b) makes absolute for a period of three years.

Section 310(b) on its face is entirely straightforward in flouting the prohibitions of the First Amendment, since it absolutely prohibits anyone convicted of violating the Act from influencing proposed legislation directly or indirectly, or from testifying before a Congressional committee, for a period of three years, under the penalties of felony, i.e., five years imprisonment and a fine of $10,000; and for that reason it was stricken down by the District Court. Since it imposes a legislative penalty whose application is mandatory upon conviction of violation of any provision of the Act, the District Court held that it presented another ground for holding the statute bad in its entirety. The Government's contentions here, on the one hand, that this Court *should not decide* but should instead *assume* that it is *un*constitutional, and then actually decide what would then be the *moot* question of whether it is *severable*, and its alternative argument necessarily based upon the assumption that First Amendment rights can be *licensed* by the Congress, of themselves afford the strongest indication that the decision of the District Court was eminently sound and should be affirmed here.

ARGUMENT

I. The Lobbying Act Is Unconstitutionally Vague and Indefinite on its Face, and the Dismissal by the District Court on that Ground Was Right and Should be Affirmed.

It is our position, with which the District Court agreed, that the vagueness and uncertainties of this statute appearing on its face are of an order rendering it unintelligible and impossible of construction, and hence violative of the Fifth and Sixth Amendments to the Constitution. Clearly this Act fails to meet the standards of definiteness which have been laid down by the decisions of this Court. We shall summarize the decisions in which these standards have been prescribed, and then discuss the several provisions of the Act which we contend are unconstitutional for failure to meet these established requirements of definiteness.

A. This Court's only jurisdiction here under the Criminal Appeals Act is to determine constitutional questions on the face of the statute, and its consideration cannot be restricted to specific applications thereof which are sought in the Information.

It will be shown that this Court, under the Criminal Appeals Act, has no jurisdiction in the premises to determine the constitutionality of the Lobbying Act except on its face and as Congress has written it. But even in the absence of this statutory bar to its acceptance of the Government's theory, the same result would obtain under this Court's long-established policy of considering only on its face a statute challenged for its restriction of First Amendment freedoms, e.g., *Stromberg* v. *California*, 283 U.S. 359, 369-370, *Thornhill* v. *Alabama*, 310 U.S. 88, 99. The Court has likewise applied this doctrine in striking down statutes too indefinite to meet the standards of due

process, as in *Lanzetta* v. *New Jersey*, 306 U.S. 451, where the Court said at page 453:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U.S. 214, 221; Czarra v. Board of Medical Supervisors, 25 App. D.C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U.S. 359, 368; Lovell v. Griffin, 303 U.S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

But particularly should this rule apply, as this Court has said, where First Amendment freedoms are restricted by the act, and for a very sound reason. Such a statute, which visits with criminal penalties the exercise of First Amendment freedoms, operates by its very existence, and without regard to specific charges of particular violations, as a constant and pervasive threat to obstruct the exercise of rights enjoying the higher protection of the Constitution. The Court stated this principle in *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98, as follows (italics added):

> There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. Schneider v. State, 308 U.S. 147, 162-165; Hague v. C.I.O., 307 U.S. 496, 516; Lovell v. Griffin, 303 U.S. 444, 451. * * * It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near v. Minnesota, 293 U.S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure

> to procure it. Lovell v. Griffin, 303 U.S. 444; Hague v. C.I.O., 307 U.S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. * * * *Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.* Stromberg v. California, 283 U.S. 359, 368; Schneider v. State, 308 U.S. 147, 155. Compare Lanzetta v. New Jersey, 306 U.S. 451.

But here the Government has brought its appeal under the Criminal Appeals Act, 18 U.S.C. §3731, and the principle above stated is that applying even where there is no jurisdictional statute making the application of the principle mandatory on the Court. In cases like the present, which come up for review under the Criminal Appeals Act, this Court, under its own controlling decisions, has no choice other than to consider the question of constitutionality on the face of the statute, and as Congress has written it. This Court does not have jurisdiction under the Criminal Appeals Act to limit its constitutional determination to particular applications of the statute sought to be made in an information filed thereunder. Even if the District Court had declared the Lobbying Act unconstitutional, not on its face, but as sought to be applied by specific charges of the Information, this Court, under the Criminal Appeals Act, could not take jurisdic-

tion of the appeal, but would have to remand the case to the Court of Appeals. But the District Court having declared the Act unconstitutional on its face, and this regardless of the constitutionality of particular applications sought by the Information, this Court surely does not have jurisdiction now to decide constitutionality on any basis other than that considered by the District Court, namely, the constitutionality of the Lobbying Act on its face and as the Congress has written it.

We should have thought these principles were elementary, but the Government's surprising unfamiliarity therewith is shown by its citation of *United States* v. *Petrillo*, 332 U.S. 1, (Government brief pp. 82n, 83, 87) as an authority claimed to support its position that the scope of this Court's review of constitutional questions is here restricted to the applications of the statute which the Information seeks. But the *Petrillo* case holds exactly the opposite. In that case the constitutionality of a statute came up for review under the Criminal Appeals Act after the District Court had held it unconstitutional on four grounds. The first two grounds dealt only with the constitutionality of the statute on its face, but the latter two dealt with the constitutionality of applications of the statute sought to be made by the information. This Court held that it had jurisdiction under the Criminal Appeals Act to review the first two questions, for the reason that they raised no more than naked issues of whether the statute was constitutional on its face. But this Court refused to take jurisdiction under the Criminal Appeals Act to review the last two questions for the reason that the constitutional issues had been raised, not by the face of the statute, but only by the applications of the statute which the Government sought to make by the charges of its information. As this Court said at p. 12 (italics added):

> * * * we refrain from considering any constitutional questions *except those concerning the Act as written.* We do *not* decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. *We only pass on the statute on its face* * * *

On page 87 of its brief the Government erroneously cites the following statement from the *Petrillo* case as supporting its position that the Court should not decide the constitutionality of the Lobbying Act on its face, i.e.:

> It is our earnest hope that the Court will refuse, once again, "to strike down a statute as violative of * * * constitutional guarantees * * * when the statute has not been, and might never be, applied in such manner as to raise the question [defendants] ask us to decide." *United States* v. *Petrillo,* 332 U.S. 1, 11.

The enormity of the Government's error may be confirmed by reference to the context in which this statement from the *Petrillo* case was made. From that context it is established that the Court's condemnation was *not* of a proposal to decide constitutionality on the face of the Act, for that is exactly what the Court did in the *Petrillo* case. Quite to the contrary, this condemnation was *of the proposal which the Government is making here,* that the Court determine constitutionality—not on the face of the statute as Congress has written it—but merely as the Government sought to have the statute apply in particular instances under the specific charges of its information.

In fact, the Government's present contention that the constitutionality of the Act must be determined on any narrower basis than from its face, and as Congress has written it, was never urged in the District Court, for there the Government's arguments were all calculated to defend its constitutionality on its face, and without limi-

tation to any particular manner in which it was sought to be applied in the Information. The contention of its present brief that the Court should limit its consideration to whether the Act is constitutional only as the Information seeks to apply it, actually urges the Court to exceed its proper jurisdiction under the Criminal Appeals Act.

Its position in this regard, as noted heretofore, is the foundation upon which its principal argument is entirely grounded, and since the *Petrillo* decision demolishes that position, the overwhelming bulk of the presentation of its brief is demolished along with it.

Under the *Petrillo* case, therefore, the Court in the present circumstances has jurisdiction under the Criminal Appeals Act only to review the constitutionality of the statute upon its face and as Congress has written it. But there is nothing in the Criminal Appeals Act which obliges the Court to abstain from considering the charges of the present Information as an aid to the exercise of its proper jurisdiction to determine the constitutionality of the statute as it stands. As the construction put upon the statute by the arm of the Government charged with its enforcement, it is entitled, we think, to the Court's consideration in determining whether the statute violates the Constitution on its face. Thus, for example, if it indicates to the Court, as it does to us, that the Justice Department is itself hopelessly confused by the vagueness and ambiguities of the Act, that can be taken into account and accorded its proper weight in deciding whether, in violation of the Fifth Amendment, it fails on its face to afford to men of common intelligence or to juries adequate notice of its applicability and requirements. And if it establishes that the Department is attempting to enforce the statute to cover activities immune from regulation under the First Amendment, that factor can also be considered in determining whether

the statute on its face and by its very existence, acts as a pervasive and continuously overhanging threat, and hence as an unwarranted obstruction, to the free exercise of First Amendment freedoms. As indicating the administrative construction placed upon the Lobbying Act by the Department charged with its enforcement, the Information can freely be resorted to for the limited but important purposes indicated, as a valuable aid to the Court's deliberations. But as any sort of restriction upon the proper scope of this Court's review of the constitutionality of the law upon its face, the Information has no effect whatever and its charges, from that standpoint, are quite irrelevant. It is, of course, only for the first of these two purposes that we refer in this brief to some of the specific charges of the Information. But we desire to emphasize that the Court under the Criminal Appeals Act is without jurisdiction to employ the charges of the Information as blinders, or for the purpose of fencing in, as the Government urges, the scope of its review.

B. Criminal statutes, to avoid violation of the Fifth and Sixth Amendments, must be sufficiently definite to apprise the laymen of ordinary intelligence who may be subject thereto, whether such statutes apply, and, if so, what things must be done to comply with their terms.

The test of whether a statute is so vague and indefinite as to render it unconstitutional is not whether a judge or a lawyer might understand what it applies to and what it calls for, although we contend that not even legal minds could, with any prospect of success, attempt to resolve the uncertainties of the statute under discussion. The Congress is obliged, on the contrary, to make its meaning clear to the "man of common intelligence"—the "layman" who will be required to comply with the Act.

This constitutional requirement of definiteness is so well settled by the repeated pronouncements of this Court that brief reference to only a few of the representative decisions will be made. Thus it has been said that "[i]f the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind" (*United States* v. *Reese*, 92 U.S. 214, 220); that "[l]aws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid" (*United States* v. *Brewer*, 139 U.S. 278, 288); that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law" (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391); that "it will not do to hold an average man to the peril of an indictment [under a statute] involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result" (*Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 465); and that "[t]he legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord" (*Smith* v. *Cahoon*, 283 U.S. 553, 564).

In *Winters* v. *New York*, 333 U.S. 507, 515, the Court said:

> The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." • • • There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess

> at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act * * * or in regard to the applicable tests to ascertain guilt.

The rule was similarly declared in *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 598:

> In a criminal statute, the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. * * * The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. * * * The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another.

This decision has been cited with approval in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 92; *Connally* v. *General Construction Co.*, 269 U.S. 385, 392; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 455, and specifically followed by the Three-Judge Court in the *N.A.M.* decision (*infra*, p. 96).

C. Criminal statutes restricting First Amendment freedoms must comply with stricter requirements of definiteness than other criminal statutes.

The Federal Regulation of Lobbying Act concerns itself entirely with the imposition of restrictions upon the right of free speech, of peaceable assembly and to petition for redress of grievances which, save for narrowly limited exceptions, Congress, by the terms of the First

Amendment* is expressly forbidden to abridge. Thus the Act falls within the doctrine established by this Court's decisions that criminal statutes limiting First Amendment rights must comply with standards of definiteness even more exacting than those which deal with other matters.

These more stringent requirements of definiteness and certainty, we believe, rest on the soundest reasons of policy. For the more vaguely a criminal statute limiting First Amendment rights is drafted, the more effectively will it operate to discourage those who are apprehensive of incurring its penalties, from exercising their fundamental constitutional freedoms. In this manner, a criminal statute, vague and indefinite in its terms, which restricts the exercise of First Amendment rights, violates not only the Fifth and Sixth Amendments, but through its *in terrorem* effect against all who prudently choose to remain silent rather than hazard the possibility of criminal prosecution, operates to throttle the freedom of expression which the First Amendment was intended to secure.

With these considerations in mind, this Court has stated repeatedly its requirement that statutes penalizing free expression must, to come within the permissible exceptions, state with a considerable higher order of precision and certainty both the scope of their application, and the requirements of compliance.

This Court has often applied the principle just stated in holding statutes restricting First Amendment rights unconstitutionally vague for violation of *both* the First and Fifth Amendments. Thus in *Winters* v. *New York*, 333 U.S. 507, 509, the Court said:

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* "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. * * * A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

Also in *Stromberg* v. *California,* 283 U.S. 359, 369, it was said:

> The maintenance of the opportunity for free political discussion to the end that Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

See also, *Thomas* v. *Collins,* 323 U.S. 516, 535-536, where the Court observed:

> In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press or free assembly, in any sense of free advocacy of principle or cause.

And compare the reasoning of the concurring opinion of Mr. Justice Douglas in *United States* v. *Rumely*, 345 U.S. 41, 48-58.

D. The Lobbying Act violates the Constitution in numerous respects because the vagueness and uncertainty of its terms render its application and requirements largely incomprehensible to men of common intelligence.

Even upon a bare perusal of the statute it becomes apparent that it is not limited in its application to "lobbying". Indeed, the term "lobbying" appears in the Act only in the title and in Section 301, which states that:

> This title may be cited as the Federal Regulation of Lobbying Act.

Thereafter the Act sets about to impose registration requirements (under penalty, as hereafter shown, of fine, imprisonment and deprivation of First Amendment freedoms) upon those who engage in activities which have never been comprehended in the concept of "lobbying"—as the term is understood in common usage. See *United States* v. *Rumely*, 345 U.S. 41, 47 for this Court's definition of the term "lobbying" to include only situations in which legislators have been personally approached or solicited.* But the present statute goes far beyond the personal solicitation of Congressmen and Senators and, as hereafter demonstrated, seeks to impose its restrictions on the expression by practically anyone of his views on any subject of general interest.

By Section 307, entitled "PERSONS TO WHOM APPLICABLE" the Act is declared to apply to "any person" who by himself or through an agent "in any manner

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* For a consideration of this Court's definition of "lobbying" appearing in the *Rumely* case, see *infra*, pp. 64-67.

whatsoever, *directly or indirectly,* solicits, collects, or receives money or any other thing of value to be used *principally* to aid, or the *principal purpose* of which person is to aid, in the accomplishment of any of the following purposes:

"(a) The passage or defeat of any *legislation* by the Congress of the United States.

"(b) To *influence, directly or indirectly* the passage or defeat of any *legislation* by the Congress of the United States."

In this quotation we have emphasized those terms of this controlling section which we regard as standing most offensively in repugnance to the requirements of definiteness enjoined by the First, Fifth and Sixth Amendments, discussed above.

Section 305 says that "[e]very person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file" the reports enumerated in Section 305. Section 308 provides that "[a]ny person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress * * * shall, before doing anything in furtherance of such object" register therein as provided and file the information which Section 308 calls for; and Section 310 declares (in subsection (a)) that any person who violates any provision of the Act (*scienter* not required) shall be guilty of a misdemeanor, and subject to a fine of not more than $5,000 or imprisonment for not more than twelve months, or both, while subsection 310(b) prescribes the additional penalty that "any person convicted of the misdemeanor specified [in subsection 310(a)] is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support or opposition to pro-

posed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

We shall consider first the indefiniteness of the terms italicized in the above quotation of section 307, and thereafter we shall point out a number of other respects in which the statute fails, by reason of its vagueness and uncertainties, to comply with the requirements of the Constitution.

(1) *The term "legislation" as defined in the statute has no ascertainable meaning and hence is violative of the Constitution.*

The term "legislation" is one of the terms specifically defined in the Act, i.e., in Section 302(e), as follows, with italics added:

> (e) The term "legislation" means bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, *and includes any other matter which may be the subject of action by either House.*

The constitutional infirmities of this definition hereafter pointed out, necessarily pervade the entire statute, since all of the sections of the Act prescribing its requirements make it necessary that a person shall have done something in relation to "legislation" as thus defined in Section 302(e). Consequently, if the term, as thus defined by Congress, is too broad or too indefinite, it must invalidate the entire statute under the Constitution.

What could have been meant by that portion of the definition which we have emphasized: "and includes any other matter which may be the subject of action by either

House"? The immediately preceding clauses of the definition by their explicit terms apply to all "matters pending or proposed in either House", and the inclusion, by way of addition to such matters "pending or proposed", of "any *other* matter which *may be* the subject of action by either House" unmistakably exhibits the legislative intent to include matters which were at the time of a claimed violation of the Act, *neither* pending nor proposed in Congress. Any other construction, we submit, would nullify an important element of the definition as Congress has written it, and it is the duty of the judicial branch to give meaning to all provisions of the statute in order to avoid such nullifiation of the statutory language. *Ex Parte Bank*, 278 U.S. 101, *McDonald* v. *Thompson*, 305 U.S. 263.

What is meant by "any other matter which"—though neither "pending or proposed"—"*may be* the subject of action by either House"? We see no escape from the conclusion that Congress specifically included within this definition matters which, though not presently under consideration or proposed in either House, might become "pending or proposed" at some unstated and indefinite time in the future. It would follow that a person who failed to register might be subjected retroactively to the penalties of the statute if he advocated or opposed a cause with which the Congress was not at that time concerned in any way, but which it might consider a year, five years, or ten years in the future. Certainly such activities would have been with respect to "legislation" as defined in this statute. How can any person who makes a speech on any topic know that this same topic may not at some time in the future become a "subject of action by either House"? Here, it appears to us, is a signal type of the dual repugnance of an indefinite criminal statute to the prohibitions not only of the Fifth and Sixth Amendments, but also of the First Amendment.

In practical effect the statute, through its employment of this definition of "legislation", confronts all Americans with the alternative of registering under the Act as "lobbyists" on the one hand, or of refraining, on the other hand, under the overpowering threat of fine, imprisonment, and mandatory deprivation of First Amendment freedoms for three years, from addressing their fellow citizens on any subject matter of general interest, where this involves (under Section 305) the receipt or expenditure of *any* money. The definition, we submit, is fatally uncertain, and of itself operates to render the entire statute unconstitutional.

Several decisions of this Court in similar situations support this conclusion. *Connally* v. *General Consi. Co.*, 269 U.S. 385, involved a suit to enjoin enforcement of a state statute which made it a crime for anyone having a contract with the state to pay less than the "current rate of wages in the locality where the work is performed." The Court held that both the terms "current rate of wages" and "locality" were fatally vague, saying (p. 395):

> The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but *upon the probably varying impressions of juries* as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal. (Italics added.)

Yet the situation here is much worse. For no one can determine with any assurance what matters may at some indefinite time in the future become the subject of Congressional action.

International Harvester Co. v. *Kentucky*, 234 U.S. 216, involved a state antitrust statute which made it *lawful* to combine to fix prices unless the price fixed differed

from the "real value" of the article. "Real value" was defined to be "market value under fair competition, and under normal market conditions." If the price fixed differed from "real value," the combination was subject to criminal penalties. The Court held that the statute violated due process because it would be impossible to determine what *would have been* the normal market value but for the combination and under other conditions that did not exist. The Court said that the standard was too indefinite because it dealt "with an imaginary condition other than the facts" (p. 223). Here, the definition of "legislation" in the Lobbying Act is at least equally objectionable, since it requires persons who may be subject to it, as well as jurors, to speculate and try to imagine whether a particular matter may at some later time become the subject of Congressional action.

It is, of course, impossible for anyone to determine with any degree of certainty what may be the subject of Congressional consideration at some future date. We submit, therefore, that the term "legislation", standing in violation of the Constitution for uncertainty, and pervading, as it does, all operative provisions of the statute, of itself serves to render the Lobbying Act unconstitutional in its entirety.

The Government in its brief, at page 58n, attempts to defend and even further to define this definition of "legislation." It says that the definition offers no difficulties in this case when it is construed in the light of the charges of the Information. But as shown *supra*, pp. 16-20, under the doctrine *United States* v. *Petrillo*, 332 U.S. 1, this Court has no jurisdiction under the Criminal Appeals Act so to construe it, and is limited to determining whether it is constitutional solely on the face of the Act. Then the Government without support of any authority or rational justification whatever advances the proposition that "the critical phrase, 'which may be the

subject of action by either House' can be read as referring to 'other matters' which 'are' being considered by Congress, its organs, or its members, or which 'are' being presented at that time *to some member of Congress.*" (Italics added.) We are somewhat in the dark as to the meaning of this, but we can assert that we have been pondering this statutory language for more than five years and that the Government's largely unintelligible construction had never crossed our mind before we read its brief. It seems, however, to argue that anyone who writes or speaks on a matter of general interest must bear the risk of whether someone else may, unbeknownst to him, be talking secretly to some Congressman about it at the moment. Does the Government believe that any layman of common understanding who read the Act would conceive of such a construction? Here, we submit, the Government has presented an argument more compelling than any we have made that the section violates the Fifth Amendment on its face.

(2) *The statutory terms "to influence directly or indirectly" are fatally indefinite, and become doubly so when combined with the term "legislation".*

As already noted, the statute, in Section 307, states that it shall apply to any person who solicits, collects, or receives money "to *influence, directly or indirectly,* the passage or defeat of any legislation by the Congress of the United States."

In the *N.A.M.* decision, which the lower Court in the present case (R. 39) declared to be "at least stare decisis if not res adjudicata," the Three-Judge Court unanimously declared this statutory language to be violative of the Constitution by reason of its vagueness and uncertainty in the following statement (*infra,* p. 96-97):

> The clause, "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute

> an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indirectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

We believe it undeniable that the Act through its employment of this language, is susceptible on its face at least to all the constructions which the Three-Judge Court suggested as possible in the *N.A.M.* decision. Indeed the Government itself in this proceeding has charged these defendants with having done many of the things to which the Three-Judge Court referred, and in addition with other acts that are even more palpably irrelevant to commonly accepted notions of "lobbying". Thus the Three-Judge Court observed that it might be a violation of the terms of this Act to urge third parties to write to their Congressmen. But the Government here carries it a step further and charges the defendant Moore, for example, with violating the Act through having employed A to write letters to X, Y and Z, urging the latter, in their turn, to write to their Congressmen respecting legislation. Specifically, the Government charges in Count I, paragraph 11 (g) (R. 5) that:

> (g) On or about February 5, 1948, the defendant Ralph W. Moore, procured one Scott Stevens McCloskey to write letters to Grange officers in the Pacific northwest, urging them to write and wire their Congressmen to put peas in the program for foodstuffs to be sent to Europe under the European Recovery Program.

How far, as the Court asked in the *N.A.M.* decision, can the application of this clause "to influence, directly or indirectly, the passage or defeat of legislation" be carried? Section 308 specifically exempts from its particular coverage "any person who merely appears before a committee of Congress * * * in support of or opposition to legislation"; but how about a person who engages another to appear before a Congressional Committee? In the next succeeding paragraph of the present Information the Government charges this, in the absence of registration and filing, to constitute a violation of the Act as follows:

> (h) The defendant Ralph W. Moore procured one Carl H. Wilken to appear before committees of the Congress of the United States urging the legislative action regarding farm commodities which the defendants desired.

And to the same effect see paragraphs 11(i) and (j) (R. 6) of Count I of the Information.

Suppose A requests B (both are private individuals) to send copies of a document to C (another private individual) and in compliance with this request B employs and pays D to make 25 mimeographed copies of this document for C. Has B, having paid D for this mimeographing of the document sent to C, thereby violated the Act through failure to register and file reports thereunder? The Government so charges in Count V, subparagraph 2(a) of the present Information (R. 11-12) as follows:

> 2. That * * * the defendant Ralph W. Moore for the purposes of influencing and attempting to influence the aforesaid legislation * * * made the following expenditures:
>
> (a) On or about November 7, 1949, to one C. C. Hanson, at Washington, D. C., in the sum and amount of $46.21 for the services of said Hanson in mimeographing 25 copies of a document sent to

> R. M. Harriss, New York, at the request of the defendant James M. McDonald.

Suppose A employs and pays B to prepare and send out a press release to the National Press Club. Has A violated the Act by failing to register and file a report of this expenditure? The Government in the present Information so charges in Count V, subparagraph 2(c) (R. 12) as follows:

> (c) On or about November 20, 1947, to one C. C. Hanson, at Washington, D. C., in the sum and amount of $33.92 for the services of said Hanson, in preparing and sending out a press release, 50 copies of which said Hanson delivered at the National Press Club.

Under this theory it would seem that the Act would apply to one who engaged another to draft a letter for him on any matter of public concern to be sent to the editor, say, of *The New York Times.* Apparently the Government's theory is that one must now register as a "lobbyist" before communicating with the press in relation to any question of public interest, on the ground that such communications "indirectly influence" "legislation". See also the succeeding paragraphs of this Count of the Information (R. 12-13).

In the case of the defendant Harriss, as is more fully considered hereafter, the Government takes the position that anyone who merely *spends* money to "influence legislation" "directly or indirectly" violates the Act if he fails to register and report thereunder. As shown *infra,* pages 45-47, this would sweep within its ambit practically all of the responsible and civic-minded people of this country, including all dues-paying members of labor unions, farm organizations and bar associations, and not excluding even contributors to the Red Cross.

That the Government further regards this Act as conditioning upon registration and the filing of reports thereunder, the right to mold public opinion by the free

expression of one's views on public matters is made very clear, for example, by subparagraph 6(d) of Count VIII of the present Information (R. 19), which charges as follows:

> (d) On or about November 28, 1949, the defendant James E. McDonald, issued a press release in which he stated, among other things, "Government control of commodities is a dangerous thing."

Thus the present Information is plainly drafted upon the theory that efforts to mold public opinion, even where a Congressman is not approached, or (in flat contradiction of the Government's brief) even where no one is asked to write to a Congressman, constitute a violation of the Act in the absence of registration and filing of reports.

In *Rumely* v. *United States,* 197 F. 2d 166, Judge Prettyman declared that a statute so construed would violate the Constitution, and on appeal (*United States* v. *Rumely,* 345 U.S. 41) this Court construed the Congressional Resolution under scrutiny as withholding authority to investigate efforts to mold public opinion, indicating at the same time that serious doubts would arise if the Resolution were as broadly interpreted as the Buchanan Committee had sought to apply it. This Court stated at p. 46:

> Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. In light of the opinion of Prettyman J., below and of some of the views expressed here, it would not be seemly to maintain that these doubts are fanciful or factitious.

The "views expressed here" were those set forth in the concurring opinion of Justice Douglas, with which Justice Black concurred (at pp. 48-58), and in which, we think, they clearly indicated their position that a measure, such as the present, which would limit or condition the right to mold public opinion, would stand in violation of the First Amendment, e.g., at pp. 56-57:

> We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people. * * * The aim of the historic struggle for a free press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." * * * That is the tradition behind the First Amendment. Censorship or previous restraint is banned. * * * Discriminatory taxation is outlawed. * * * The privilege of pamphleteering, as well as the more orthodox types of publications, may neither be licensed * * * nor taxed. * * * Door to door distribution is privileged. * * * These are illustrative of the preferred position granted speech and the press by the First Amendment. The command that "Congress shall make no law * * * abridging the freedom of speech, or of the press" has behind it a long history. It expresses the confidence that the safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views.

That "influencing legislation indirectly" covers efforts to mold public opinion, even though members of Congress are not approached, is not merely the theory of the Government as shown by the charges of the present Information above set forth; it was likewise the express view of the Buchanan Committee in seeking to discharge what it regarded as its proper functions under the Congressional authority involved in the *Rumely* case, since that Committee stated in its report (H.R. Rep. No. 3024,* p. 2,

* 81st Cong. 2d Sess.

quoted in the concurring opinion of Justice Douglas in the *Rumely* case (345 U.S. 41, 51)) that:

> Our study of this organization indicates very clearly that its most important function is the distribution of books and pamphlets in order to influence legislation directly and indirectly. It attempts to influence legislation directly by sending copies of books, pamphlets, and other printed materials to Members of Congress. It attempts to *influence legislation indirectly* by distributing hundreds of thousands of copies of these printed materials to people throughout the United States. (Italics added.)

For these reasons we believe that the Court in the *N.A.M.* decision (*infra*, p. 96-97) was conservative and altogether realistic in its statement of what might be covered by the clause "*to influence indirectly* the passage or defeat of legislation," and we should think that there could be no disagreement with its observation that:

> It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

Particularly does this feature of the statute render it bad when it is recalled that the term "legislation" appearing in the same clause, and standing of itself, as already shown, in violation of the Fifth Amendment, serves only to compound and render additionally fatal the vagueness of the "indirect influencing" of "legislation" which the statute would punish as a crime in the absence of compliance with its registration and filing requirements. We therefore regard as inescapable the conclusion of the Court in the *N.A.M.* decision (*infra*, p. 96) that:

> The clause, "to influence, directly or indirectly, the passage or defeat of any legislation by the Con-

gress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt.

(3) *The terms "to be used principally to aid" and "the principal purpose" appearing in Section 307 are fatally vague and indefinite, and since they govern the applicability of the whole statute, of themselves render it unconstitutional in its entirety.*

Section 307, entitled "PERSONS TO WHOM APPLICABLE" provides, so far as material at this point:

> The provisions of this title shall apply to any person * * * who * * * receives money * * * *to be used principally* to aid, or *the principal purpose* of which person is to aid, in * * *
>
> (a) The passage or defeat of any legislation by the Congress of the United States.
> (b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

What could Congress have meant by these terms "principally to aid" and "principal purpose"? To have a "principal purpose" must a defendant have only a single purpose, or can he have a number of purposes only one of which is "principal", or, as a third possibility, may he have several principal purposes? And if the defendant has, say, a dozen different purposes, must his legislative purpose account for as much as 51 percent of his activities, and, if so, must the 51 percent be determined in terms of time devoted to that purpose, or in terms of money received from that purpose as compared with the other purposes? Or would it be enough in such case if his legislative purpose represented 12 percent of his activities, and the remaining purposes each represent only 8 percent of his activities? And, equally if not more important, what period of time is to be chosen in determining whether the defendant engages "principally" in legislative activities—should the period be a week, month,

year, 5 years, or longer? Say the defendant spends the month of October in a particular year entirely in legislative activities, but not any other part of the year; are legislative activities his "principal purpose" as that term is employed by the Lobbying Act?

In addition to the specific determination of the *N.A.M.* decision (*infra,* p. 97) that the terms now being considered render the Act unconstitutional for vagueness, at least one Federal Court and two State Courts have passed upon the question of whether the term "principal" in comparable contexts, is sufficiently definite to convey any ascertainable meaning—whether to a layman or even a court—and they have been unanimous in concluding that it is not.

Sutton v. *Hawkeye Casualty Co.,* 138 F. 2d 781 (C.C.A. 6), involved an insurance policy containing a provision that the automobile covered would "be principally garaged and used" in a certain town. The Court ruled against forfeiture for noncompliance with this clause, on the ground that "principally is a vague, indefinite, uncertain term" (p. 785).

State v. *J. B. Powles & Co.,* 90 Wash. 112, 155 Pac. 774, involved a criminal action under a statute regulating commission merchants, defined as anyone whose "principal business" is the sale of produce for the account of the shipper. The trial court discharged defendant on the ground that "principal" meant "major", and only 25 percent of defendant's business was of this nature. The state Supreme Court held the entire statute bad, saying (90 Wash. 113-115, 155 Pac. 775-776):

> The state argued that the word "principal" does not mean "major," as the lower court in discharging the defendant held, but "regular" as distinguished from "casual," and that if this be not the definition of the word, then the definition attempted in the act was repugnant to the rest of it, and should be thrown

out entirely, in consequence of which the defendant should be held as if there were no definition at all.

The definition attempted in the statute is fatally vague. Is the principal part of a business 51 percent of mere pecuniary receipts? One may do business in which only 49 percent in gross receipts is of the commission sort, and yet in which that sort is the most profitable. When one has total receipts of $100,000 per annum, the commission part may be but $20,000, and yet his 10 other kinds of business might bring in less than $10,000 each. Thus, in both gross and net profits the commission department might bring in less than half of all the others put together, and yet bring in much more than any one. There, in one sense, the chief business would be of a commission kind. Would it, though, be the principal within this statute, when it is the principal only by this kind of comparison? We are unable to say. We cannot hold, as the lower court did, that "principal" means either gross majority in profits or more than half of all the receipts, or that it means more than any other one kind of receipts. Accordingly, upon the mere basis of money, the statutory definition is vague beyond hope. • • •

During how long a period is the test to be applied? Is it the seasonal or the annual receipts that shall control, or is it a view of the man's business during two or three years? Shall a merchant only starting in business and opening a commission department be judged immediately, or shall the state wait a year or two until his status is reasonably established?

This sufficiently answers also the state's attempted definition of the word "principal". We cannot say that this word meant regular rather than casual, for who shall define what is regular or what is casual? Some casual transactions may be of great moment and bring in during a considerable period a large excess of gross receipts.

A similar decision was reached in *State* v. *Levitan*, 190 Wis. 646, 210 N.W. 111, where the Court held unconstitutionally vague a criminal statute regulating whole-

sale produce dealers, defined as those selling produce "principally" to others than consumers.

No demonstration more convincing could be offered (save for the *N.A.M.* decision, in which the term as employed in the Lobbying Act itself was held to be fatally indefinite) than is provided by the cases just discussed, that the terms "principally to aid" and "principal purpose" render the present statute bad in its entirety. The ambiguity is even more serious here, since the term "principal purpose" is in the very nature of things a more nebulous standard than "principal business". Comparative volumes of business can be measured by quantative and monetary standards; but what jury is qualified to guess as to a man's "principal purpose"?

It is significant that the Government has exerted so much effort and ingenuity at pp. 54-58 of its brief to dissuade this Court from even considering the question of whether the term "principal purpose" is fatally indefinite as it appears on the face of the statute. Although Section 307 by its own explicit terms, as well as its title, unquestionably fixes the applicability of the entire Lobbying Act, and makes it a prerequisite to applicability that a person shall have had a "principal purpose" to influence legislation, we find the Government advising the Court on page 54 of its brief that:

> Actually * * * the "principal purpose" aspect of Section 307 has little to do with this case.

Next the Court is told that Section 305 is not governed by Section 307, at least insofar as Section 305 relates to expenditures; and Section 307 receives the *coup de grace* on p. 59 where the Court is further informed:

> Section 308 does not refer to Section 307 and is not governed by it.

In short, the Government's brief simply seeks to evade the question by affecting, through various techniques of "construction", to deprive the term of any effective statutory significance or operation. Thereafter it again informs the Court in defiance of the principles of review by which this Court is governed under the Criminal Appeals Act, that since this term is *not* sought to be applied by specific charges of the Information, this Court in consequence cannot consider whether it is unconstitutional on its face. But as we have demonstrated (supra, pp. 15-20), that position is false and precisely the opposite is true. That the Government should think itself driven to resort to such shifts of sophistry and evasion fairly indicates, we submit, its own conviction that the term "principal purpose" violates the Constitution on the face of the statute.

In the *N.A.M.* decision, *infra*, p. 97, which the lower Court declared to be "stare decisis if not res adjudicata" of the present case (see R. 39), the Three-Judge Court stated:

> The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.
>
> What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.
>
> We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standing of guilt.

We submit that the conclusion of the Court in the *N.A.M.* decision that the term "principal purpose" is unconstitutionally vague and indefinite, is eminently sound, and should be affirmed.

(4) *There are other serious ambiguities of an order sufficient of themselves to invalidate the entire statute.*

We shall point out hereunder some other important respects in which the Act is fatally vague and ambiguous.

First we note the apparent conflict between the provisions of Section 307, on the one hand, and Section 305, on the other. Section 307 was included to fix the applicability of the entire statute ("of this title") by defining, according to its title the "PERSONS TO WHOM APPLICABLE". It provides that: "The provisions of this title shall apply to any person * * * who * * * solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid," in accomplishing the purpose "to influence, directly or indirectly, the passage or defeat of any legislation * * *." It is to be emphasized that this Section by its express terms fixes the applicability of *the entire title*, and the title, of course, includes Section 305. Furthermore, it makes applicability dependent upon *principality of purpose.* And it would appear, of necessity, to limit all sections of the title (including, of course, Section 305) to those persons who *receive* money.

But when we turn to Section 305, under which Harriss is charged merely with *spending* (not with *receiving*) money, we find that the latter section provides that "every person receiving any contributions *or* expending any money" to influence legislation directly or indirectly is required to file quarterly reports with the Clerk of the House of Representatives. It was urged on behalf of

Harriss in the District Court that unless the Court is to hold Sections 307 and 305 to stand in irreconcilable conflict with each other, 305 must be construed to refer to expenditures only by persons who in addition have *received* money as required by Section 307. While this construction appears to us quite obvious and inescapable, the point is that the ambiguity of the Act in this regard, as it would confront persons of ordinary intelligence, is strikingly demonstrated by the Government's having prosecuted Harriss merely for having expended money on his own account without charging that he received any money for any purpose. The Government, in short, has proceeded to read an important element of Section 307 out of the Act in order to give a more expansive interpretation to Section 305.

Nor is this the only respect in which these Sections can be construed to contradict each other. Again, Section 305 provides that every person receiving or expending *any* money to influence legislation is required to register and make reports, while Section 307 makes the entire title applicable only to those whose *principal purpose* is to influence legislation. The Government, it will be noted by reference to paragraph 2 of Count IV of the Information (R. 14) has chosen to adopt a hodge-podge construction of Section 307 *vis-a-vis* Section 305; for while (in disregard of the requirement of Section 307 that a person *receive* money) it charges Harriss only with spending money to influence legislation, yet it still retains the requirement of Section 307 of *principal purpose*, i.e., it charges: "That * * * Harriss * * * *expended* money *principally* to aid in influencing, directly or indirectly, (a) the passage of legislation by the Congress of the United States * * *." The authority, or rational basis, upon which the Government, in order to expand the coverage of this criminal statute, can strike out that portion of Section 307 which it does not like, and at the

same time retain another portion of the same section to which it apparently does not object, is as yet unknown to us. We doubt that it would be apparent to a man of common intelligence.

Now since the Government in its present charges against defendant Harriss takes the position that anyone who spends any money to influence legislation must register under the Act, and since, as shown hereafter (*infra,* pp. 70-71), the statute on its face precludes the application of *de minimis,* it would follow that every businessman belonging to a trade association would have to report the payment of his dues, and every laboring man who, say, donated anything towards the repeal of the Taft-Hartley Act would have to register and file the requisite reports.

The list might be continued endlessly. Labor unions are constantly seeking to influence legislation, and such activities are financed from dues which their members pay in the full knowledge that these funds will be used to finance such activities; consequently if the charges against Harriss were sustained under the Act every union man in the country is likewise under the Act and is overhung with the threat of prosecution. The Red Cross, as is well known, regularly seeks the enactment of federal legislation and hence any contributor to the Red Cross is likewise under the Act and likewise at the mercy of the public prosecutors. And so with the Farmer's Union, the National Grange, and the Farm Bureau Federation, not to mention a host of other organizations whose collective membership includes the majority of the civic-minded, public-spirited and responsible citizens of this country.

Bar associations as a matter of common knowledge regard it not only as their proper function but their public duty to make recommendations to Congress re-

garding the enactment, amendment and repeal of legislation. The activities of these associations are financed by the dues which are paid by their lawyer-members who pay their dues in the knowledge that they will be used in large measure to finance the group activity of influencing legislation. The Bar Association of the District of Columbia, for example, insists upon its right to make recommendations to Congress regarding judicial appointments; and the American Bar Association is constantly advocating to Congress the enactment, amendment and repeal of Federal legislation. As a result it would be hard to find many lawyers in this country to whom the Act would not be applicable under the construction which the Government urges here. And if the Government should prevail in its contention the defendant Harriss is under the Act merely because he allegedly spent money to influence legislation, it would be in a position to contend not only that Harriss's counsel as members of bar associations, but practically every other lawyer in this country is under the Act; as a matter of fact under this construction Government counsel themselves, if they belong to bar associations, are under the Act and delinquent in their failure to report the payment of their dues. If the Government is right everybody is under the Act and we are all under the Act.

Were the Government to prevail against Harriss under its construction of the law it would be in a position to contend that anyone who expended the price of a postage stamp to write to his Congressman, or anyone who paid for a telegram to his Congressman was liable to prosecution for failing to register under the Act. As shown *infra*, pp. 70-71, application of *de minimis* would conflict with the express requirements of statute, but even if the courts should throw out such prosecutions as *de minimis* they would be powerless to prevent their being brought or to protect the people from the expense and

disgrace of their being brought or from the anxiety attendant upon the threat of their being brought.* The Government in the first instance would have complete autonomy to determine the question of *de minimis insofar as it related to the question of prosecuting or threatening to prosecute.* Is that the autonomy that the Justice lawyers desire and that they are now asking this Court to bestow upon them?

Would the Department's construction be apparent to a man of ordinary intelligence? Let us say that such a man, before making a contribution to an organization engaged in "legislative activities" looks at the Lobbying Act in an effort to determine from its face whether that expenditure will be covered by the Act. At once he notices that Section 307 is entitled "PERSONS TO WHOM APPLICABLE". Upon reading it he finds to his relief that it mentions specifically only persons who "solicit, collect or receive money" and refers to a "principal purpose"—nothing is said about spending money or making contributions. Would he be expected, as a man of common intelligence to assume that Section 307, though by its explicit terms it fixes the applicability "of this title" —of the entire Lobbying Act—actually does nothing of the sort, at least according to the attorneys of the Justice Department who may later prosecute him? That though its definition is in terms confined to persons who *receive* money, yet other sections of the Act which it in terms controls operate to nullify and cancel out that

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* This settled principle was stated by the Three-Judge Court in the *N.A.M.* decision as follows (*infra*, p. 92):

> It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions. Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity.

limitation? That its requirement that a person have a "principal purpose" to influence legislation will be obliterated by the administrative construction of the Justice Department? Suppose he reads the legislative history of the Act in order to be very sure that Section 307 means exactly what it says. At 92 Cong. Rec. 10088 he finds the statement of Congressman Dirksen, a sponsor of the bill and a member of the Special Committee, addressing the House as follows (italics added):

> *The gist of the antilobbying provision is contained in section 307.* What this is designed to do is bring about registration, and a statement of *receipts and expenditures* on the part of a person who is *employed* for the *principal purpose* of accomplishing two things. First, the passage or defeat of any legislation by the Congress of the United States; the second is to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

Next he turns to the Senate Report on the Reorganization Act (S. Rep. No. 1400, 79th Cong. 2d Sess.) which is quoted extensively at pp. 31-32 of the Government's brief, and he finds the statement at pp. 26-27 that:

> in order that there may be no misunderstanding of the purposes of this title the committee desires to make a statement of what the title does and what it does not do.

Then he continues to read the Committee's description of the "three distinct classes of so-called lobbyists", set forth in the passage quoted in full at pp. 31-32 of the Government's brief, whom the Committee states to be subject to the Act. He concludes that he is *not* one of those who "initiate propaganda from all over the country" particularly since the report says that this class will be required to disclose *"the sources of their collections."* He intends only to *spend* money, not collect it. Neither, he concludes, does the second category of "those

who are employed to come to the Capitol under the false impression that they exert some powerful influence over members of Congress" apply to him, particularly in view of the statement of the Report that such persons will be required to report *"the amount of their contributions."* He proceeds to the third and final class of persons covered, and any doubts he may have entertained upon reading the description of "entirely honest and respectable representatives of business, professional and philanthropic organizations who come to Washington openly and frankly to express their views" ~~is~~ are dispelled when he reads at the end of the paragraph that they will be required to *"state their compensation."* He therefore concludes from the fact that the Senate Report announces that these are the three classes of persons subject to the Act, in order, as the Committee further says "that there may be no misunderstanding * * * as to what the title does and what it does not do", that Section 307 can be trusted to mean what it says, and that the Act, in accordance with the explicit provisions of Section 307, is limited to persons who solicit, collect or receive money. Accordingly, he makes his contribution to the organization engaged in "legislative activities", whether the American Medical Association, or the United Mine Workers, or the Daughters of the American Revolution, or the Farm Bureau Federation, or the Red Cross, or whatever; and thereafter, if no luckier than Harriss, he is criminally prosecuted by the Justice Department on charges of having violated the Lobbying Act.

The point is that here is a statute so vague and indefinite that the Congress, through its committees and sponsors of the legislation, interprets it one way, and the Justice Department, charged with its enforcement, interprets it exactly the other way. In this situation is the statute sufficiently definite to be understood by a man of common intelligence? Do men of common intelligence

who try to understand this Act succeed in understanding it? Congressman Halleck, the ranking Republican member of the Buchanan Committee, and now majority leader of the House, informed the House at 96 Cong. Rec. 13887, as follows:

> The chairman has said there is no clear definition of "lobbying" and there is none. As a matter of fact, the statute is so indefinite that many, many people do not know when they are in compliance and when they are not. They do not know when to register and when not to register. That is why the work of the committee has been particularly onerous.

A further serious ambiguity of Section 307 might lend color to the Government's thus undertaking to cancel out the words "solicit, collect or receive money", did it not exhibit the vagueness—nay the unintelligibility—of this section to a degree not even heretofore considered. Section 307 refers to "any person * * * who solicits, collects, or receives money * * * to be used principally to aid, *or the principal purpose of which person is to aid,*" in accomplishing the purpose to influence legislation. Putting aside its violation of every known principle of grammatical construction, does this section mean that *a person need not even solicit, collect or receive any money to be subject to the Act,* provided only that he entertains the requisite sentiment or mental resolve or state of mind? While it would appear to us to be absurd to regard the application of the Act as varying with whether the person sought to be covered was *merely thinking* principally about influencing legislation, or principally about something else, yet we can imagine no other construction by which the Government could eliminate from this section the requirement that the person charged with violations shall have solicited, collected or received money.

Since the foregoing was written we have learned, upon receiving the Government's brief, that at p. 55 thereof it

announces its commitment to precisely this construction of the standards of applicability, in the statement that:

> The "principal purpose" requirement is worded alternatively. It suffices to bring a person under the Act if either (i) that person's principal purpose is "to influence" federal legislation, or if (ii) that is the principal purpose of the contribution itself, or of the expenditure itself (if the latter is to be included).

This means, as we construe it, that the arm of the Government charged with the enforcement of the Act, now regards it as applying even to persons who have neither "solicited, collected or received" any money to influence legislation, provided only that their sentiments and attitudes of mind are of such a cast as to satisfy the requirement of "principal purpose". How would a jury apply this standard? Do a silent man's unuttered thoughts present a clear and present danger to the country? Does the Government regard it as likely that a man of common intelligence would arrive at that construction of the Act? Under that construction how could the application of the Act ever be known?

A further ambiguity arises when we revert to Section 305 and examine its requirements as to the filing of reports of contributions and expenditures. It will be noted that the reports to be filed of contributions and expenditures are not limited to those made for legislative purposes. On the contrary, the section explicitly requires that a person who receives any contributions or expends any money to influence legislation shall file quarterly reports —not merely of *such* contributions and *such* expenditures —but of *all* of his contributions and *all* of his expenditures. Thus Section 305(a) provides that "[e]very person receiving any contributions or expending any money" for the purpose of accomplishing the purpose to influence legislation directly or indirectly "shall file with the Clerk between the first and tenth day of each calendar quarter,

a statement containing complete as of the day next preceding the date of filing (italics added)—

> (3) the total sum of *all* contributions made to or for such person during the calendar year;
>
> (4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;
>
> (5) the total sum of *all* expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);
>
> (6) the total sum of expenditures made by or on behalf of such person during the calendar year.

We need not catalogue in all their ultimate absurdity the various items of receipts and expenditures of a personal nature, and bearing no relation to legislative activities, which are literally demanded by this section, since such possibilities, we think, will readily suggest themselves to the Court.

This question of whether Section 305 requires a person to report all his contributions and expenditures without limitation to legislative activities is not merely a specter which we have raised here for purposes of argument; it is, on the contrary, a very serious practical problem of administration under this statute, as Congressman Buchanan himself declared to the Congress. His statement is quoted in the concurring opinion of Mr. Justice Douglas in *United States* v. *Rumely* (345 U.S. 41, 54n) as follows (with italics ours):

> Pressure groups interpret the Lobbying Act in different ways. Some file expenses. *Others file full budget*, but list expenditures they judge allocable to legislative activities. Still others file only expenditures directly concerned with lobbying. (95 Cong. Rec. 11389)

If this section, in accordance with established canons applicable to the construction of criminal measures, is to be interpreted strictly according to its literal terms, i.e., if it is interpreted to mean that any person who receives or expends any money to influence legislation must file as part of the public records all of his receipts and all of his expenditures regardless of their purpose, then it may be asked by what authority Congress can exact such public disclosure of matters having no discernible relationship to the purposes of the statute or the claimed evils which it was purportedly enacted to remove.

For all the reasons above stated, we submit, this Court should affirm the decision of the District Court that the statute is fatally vague and ambiguous and that, since men of common intelligence could not hope to guess either as to its application or requirements, it violates the due process limitations of the Fifth Amendment to the Constitution.

II. The Lobbying Act Violates the Constitution Through Its Abridgement of First Amendment Freedoms.

A. The First Amendment freedoms are of equal stature and sanctity and are the most inviolable of all rights guaranteed under the Constitution.

The rights of freedom of conscience, of speech, of the press, the right to peaceably assemble, and the right to petition the Government for a redress of grievances are the most sacred and inviolable of all the rights guaranteed by the Constitution to the people of the United States. They are of equal stature and sanctity. They are "cognate" rights. As the Court stated in *Thomas* v. *Collins*, 323 U.S. 516, 529-530:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins.

> Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice . . .
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger * * * Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom of speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights * * * and therefore are united in the First Article's assurance.

The essential nature of the right of free speech is further disclosed in the following:

> The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.
>
> *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102.

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.
>
> *United States* v. *Cruikshank*, 92 U.S. 542, 552.

> Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom.
> *Hague* v. *C.I.O.*, 307 U.S. 496, 513.

In the decisions hereafter considered, the Court was confronted with the protection of one or more of the various freedoms assured by the First Amendment against Congressional abridgment. But since all are cognate and of equal importance, principles asserted with respect to any of these freedoms apply with equal force to all the others.

B. First Amendment rights may be restricted only in the event of a clear and present danger of a substantial public evil.

This Court has uniformly held that restriction of First Amendment freedoms is permissible only where necessary to meet a clear and present danger of a substantial public evil. This rule has been adopted as a guide in balancing, on the one hand, the governmental power to protect the public and, on the other, the preservation of the inviolable rights guaranteed to the people by the First Amendment. The government of course has the duty to protect the public against serious dangers. On occasion that protection can be accomplished only through some restriction of the guaranteed freedoms. In that event the courts must determine whether the supposed public evil warrants any limitation of those freedoms and, if so, whether the degree of restriction imposed is really necessary to the elimination of the particular evil. For this purpose, the Court has adopted the so-called "clear and present danger" test. In essence the test is that, before there can be any restriction of civil liberties, there must be (1) a substantial public evil, (2) which is reasonably

probable, and (3) which justifies such invasion of the freedoms as is necessary to avoid the evil.

This rule originated with Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47, 52, and has been continued down through the Court's last pronouncement on the subject in *Dennis* v. *United States*, 341 U.S. 494, 510, where the clear and present danger test was said to mean that: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Only a few extracts from this line of decisions will, we believe, be sufficient to show that the vast, indefinite coverage and the onerous and irrational requirements of the present Lobbying Act cannot be justified by resort to the "clear and present danger" rule.

In *Herndon* v. *Lowry*, 301 U.S. 242, 258 the Court stated:

> The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.

The doctrine of "clear and present danger" is further considered in *Thomas* v. *Collins*, 323 U.S. 516, in which the Court held unconstitutional a Texas statute under which a labor organizer was charged with crime for failure to register before addressing a group of workmen to solicit their membership in a union. At pp. 536-537:

> The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave

and immediate danger to the public welfare * * * When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.

At p. 539:

> As a matter of principle a *requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.* Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is *as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.* (Italics added.)

And in *Dennis* v. *United States*, 341 U.S. 494, this Court reaffirmed the application and effect of the "clear and present danger" test. There the Court was considering the constitutionality of the Smith Act (54 Stat. 671) on its face and as applied to persons who advocated overthrow of the Government by force. The Court said that since the statute to some extent restricted speech (at p. 508)—

> In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports.

Again it said (at p. 513):

> The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts.

And it gave its definition of the clear and present danger test as follows (at p. 510):

> Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." • • • We adopt this statement of the rule.

These remarks establish beyond doubt that the clear and present danger rule is still valid and obliges the Court to determine whether the remedy adopted by Congress goes beyond what is necessary to avoid the evil.

C. The rational relationship between evil and remedy considered adequate to support other legislation is not sufficient in the case of statutes which restrict First Amendment freedoms, and in such instances the court has the duty of determining the necessity for the restrictions imposed.

Where First Amendment rights are not affected, the Court will uphold a statute if there is any rational relation between an existing evil and the remedy adopted by the legislature. The Court will not assume to determine whether the method selected by the legislature is the best method or even a wise method. The Court will look only to see whether the field regulated is one within the power of Congress, and whether the particular regulation adopted bears any reasonable relation to the exercise of that power.

But when the Court is considering the constitutionality of legislation infringing upon these fundamental First Amendment rights, its function is quite different. The

principles just stated have no application in the case of legislation which restricts First Amendment freedoms, since in such a case the Court must balance the duty of the legislature to protect the public, as against the individual rights secured and guaranteed against Congressional abridgment by the First Amendment. A rational relationship between evil and remedy is then not enough. Mere legislative preferences or beliefs respecting matters of public convenience or public need will not suffice to validate the statute. It is, to the contrary, the duty of the Court to determine whether the legislative remedy goes beyond what is necessary to protect the public against a clear and present danger and hence infringes upon the legitimate exercise of fundamental freedoms. And if the statute has that effect, the Court must strike it down.

This Court has often expressed the difference in the judicial function when statutes restricting First Amendment freedoms come under review. Thus in *Schneider* v. *State*, 308 U.S. 147, 161, it was said:

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

And in *Thomas* v. *Collins*, 323 U.S. 516, 529-530, the Court said:

> * * * The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. * * * Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

To the same effect, see *Thornhill* v. *Alabama,* 310 U.S. 88, 95-96; *Board of Education* v. *Barnette,* 319 U. S. 624, 639-640.

Thus in this case the Court has the duty of determining whether there is a real necessity for this attempted regulation of the First Amendment freedoms.

D. Application of the foregoing principles makes manifest that the Lobbying Act on its face unconstitutionally abridges First Amendment freedoms.

The basic evil in this statute is that it goes too far in its restriction of First Amendment freedoms. The problem here is not whether Congress has the power to enact some statute regulating lobbying to some extent. (see *infra,* pp. 72-76) The question is whether the Lobbying Act as Congress has written it is violative of the First Amendment. We do not challenge the power of Congress to regulate lobbying; but we maintain that the statute here clearly goes far beyond what is necessary to meet any clear and present danger of a substantial public evil and by doing so infringes upon the fair and proper exercise of civil rights.

First it is to be remarked that the act sets about to impose its onerous conditions of registration and filing upon legitimate efforts to influence public opinion, even where no member of Congress is solicited or approached. We think this construction of its coverage is indicated of necessity by its application in terms to any persons who have a "principal purpose" to *"influence,* directly or *indirectly,* the passage or defeat of any legislation" (Section 307(b)) or who receive "any contributions" or expend "any money" for this purpose, —and "legislation," as earlier pointed out, includes (Section 302(e)) by definition any matter which *"may be* the subject of action by either House." Thus it will be recalled that the Court

in the *N.A.M.* decision (*infra*, p. 96) pointed out that this language of the statute may mean:

> to influence public opinion by literature, speeches, advertisements or other means in respect to matters that might eventially be affected by legislation; it may be to influence others to help formulate public opinion.

The decisions in the *Rumely* case show that it was the conviction both of the Buchanan Committee and the legal representatives of the Government in that litigation, which the latter urged upon the courts, that a congressional resolution *deemed by them to be coextensive in its coverage with the present statute*, applied to all undertakings to mold public opinion on matters which were or might be the subject of federal legislation. As the Court of Appeals noted at 197 F. 2d 166, 172-173:

> The view of the Buchanan Committee, as reflected in such portions of its hearings as are before us, and that of the prosecutor, the trial court, and the Government in its brief and argument here, is that the publication of books upon national issues is indirect lobbying, that sending books and bulletins to Congressmen is direct lobbying, and that the Buchanan Committee had authority to investigate lobbying, direct and indirect. That is the controversy before us, as we see it.

Again at p. 175:

> There is some justification for the argument that the House intended the words "lobbying activities" in its Resolution to encompass the full scope of the Regulation of Lobbying Act. * * * A three-judge statutory court in this jurisdiction * * * has unanimously declared Sections 303 to 307 of the Lobbying Act to be unconstitutional. We have already said enough to indicate that a serious constitutional question would arise if the House Resolution were to be interpreted to include the broad powers claimed for it by the Committee. The Resolution should be interpreted to avoid that doubt.

And at p. 173, the Court of Appeals emphatically declared that any attempt by the Congress to restrict efforts to mold public opinion would be unconstitutional and void, as follows:

> That Congress has no power in respect to efforts to influence public opinion rests upon two bases. First, Congress is a representative body. It represents the people, and its power comes from the people. It is not a source or a generator of power; it is a recipient and user of power. As a representative it has no inherent authority to interfere with the thought or wishes of its principal, and the people have not conferred that authority upon their representative, the Congress. So that, even if there were no prohibition such as the First Amendment in the Constitution, Congress would lack authority to abridge either public opinion or efforts to influence that opinion. Second, the First Amendment is a direct prohibition upon the Congress. It reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Congress cannot legislate concerning "all activities intended to influence, encourage, promote, or retard legislation," or activities designed, in the language of the Buchanan Committee, "to influence legislation indirectly by influencing public opinion." If Congress had authorized its Committee to inquire generally into attempts to influence public opinion upon national affairs by books, pamphlets, and other writings, its authorization would have been void.

This Court, in affirming this decision by the Court of Appeals, not only construed the Resolution in question as excluding from its scope the authority of the Committee to investigate efforts to mold public opinion, but referred with approval to the decision of the Court of Appeals as a ground for its own serious doubts of the power of Congress to enact a measure having such effect (*United States* v. *Rumely*, 345 U.S. 41, 46):

> Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. In light of the opinion of Prettyman, J., below and to some of the views expressed here, it would not be seemly to maintain that these doubts are fanciful or facticious.

And the concurring opinion of Justice Douglas (joined by Justice Black) which the majority also referred to in the passage just quoted, condemns, as we read it, for violation of the First Amendment, all attempts by Congress to restrain or regulate the molding of public opinion through publicity or pamphleteering. All of these pronouncements, we think, point the same way and mean that any measure, such as the Lobbying Act, which attempts to restrict and impose conditions upon the right of private individuals to influence the opinions of their neighbors on public questions, violates the prohibitions of the First Amendment. And any statute regulating "lobbying" would, to avoid violation of the Constitution, or at the very least, grave doubts of constitutionality, have to be limited as indicated by this Court at 343 U.S. 41, 47, as follows:

> As a matter of English, the phrase "lobbying activities" readily lends itself to the construction placed upon it below, namely, "lobbying in its commonly accepted sense," that is, "representations made directly to the Congress, its members, or its committees," 90 U.S. App. D.C. 382, 197 F. 2d 166, 175, and does not reach what was in Chairman Buchanan's mind, attempts "to saturate the thinking of the community." 96 Cong. Rec. 13883. * * * So to interpret it is in the candid service of avoiding a serious constitutional doubt.

The Government's brief (pp. 26, 31, 36) contends that the Act applies *"at the very least"* or "at the minimum" (p. 59) to two types of behavior. Inasmuch as the District Court held the Act unconstitutional because it included *too much* in its coverage (R. 39-40, *infra* pp. 96-97), this seems a curious way for the Government to defend its constitutionality—but "at the very least", the Government says, the Act does apply to personal contacts with Congressmen and also to persons who persuade others to communicate with their Congressmen about legislation. Its brief, from beginning to end, is replete with this assertion (i.e., at pp. 16, 23-24, 24-25, 28, 33-36, 48, 49, 50, 58 and 81).

As to efforts to influence the public mind on legislative questions which are unaccompanied by a request that members of the audience write to their Congressmen, the Government is not so sure, but its brief entertains the possibility that such activities might also be covered by the Act. Thus the possibility is clearly recognized in the footnote on page 16 as follows (italics added):

> Both the history of the 1946 Act itself, and that of the 1936 progenitors on which it was modelled, show that, *whatever else Congress may have had in mind* [*Footnote 7:* For example, attempts to "saturate the thinking of the community" *or organized efforts to influence mass public opinion on federal matters.* Cf. *United States* v. *Rumely,* 345 U.S. 41, 47.] it certainly desired to reach those who seek or sponsor direct communication with Congress and Congressmen.

We maintain that the Act goes far beyond the regulation of "lobbying" in the commonly accepted sense of the word, as defined by this Court in *United States* v. *Rumely,* 345 U.S. 41, 47. The Government does not disagree, but, as shown, asserts that it applies *at least* to one who urges other persons to write or communicate with their Congressmen with respect to legislation and then goes on to claim that this activity is included within the commonly accepted meaning of "lobbying" as that term is defined in the *Rumely* decision. Indeed, the Government

says (p. 16) that the sponsoring of campaigns asking persons to write to their Congressman with respect to the merits of particular legislation is "the core of the traditional understanding of 'lobbying' see *United States* v. *Rumely*, 345 U.S. 41, 47, and [was] undoubtedly intended to be covered by * * * the 'Federal Regulation of Lobbying Act'"; and at page 50 it says that these same activities, "as *United States* v. *Rumely*, 345 U.S. 41, 47 now underlines—*are the traditional heart of lobbying and legislative influencing*". (Italics added.)

But the *Rumely* case does not hold anything of the sort. This Court in that case clearly indicated at 345 U.S. 41, 47 its acceptance of the definition applied by the Court of Appeals as follows (italics added):

> As a matter of English, the phrase "lobbying activities" *readily lends itself to the construction placed upon it below*, namely, *"lobbying in its commonly accepted sense" that is, "representations made directly to the Congress, its members, or its committees"*, 90 U.S. App. D.C. 382, 197 F. 2d 166, 175, and does not reach what was in Chairman Buchanan's mind, attempts "to saturate the thinking of the community."

Certainly this statement, citing with approval and adopting the definition of the Court of Appeals, could not on its face be construed to include the activities of those who, without personally approaching any Congressmen, urge others to write to them about legislation. Did the Court of Appeals include such activities in its definition of lobbying? Turning to its decision we find that it limited its definition strictly to contacts with, or solicitations of, Congressmen, or in the Court's phrase "buttonholing", and the Government's construction of these definitions to include a situation where Congressmen are not even personally approached is quite imaginative and without justification. Thus, Judge Prettyman defined lobbying in *Rumely* v. *United States*, 197 F. 2d, 166, 174-175 as follows (italics added):

> "Lobbying" is a word of common meaning. The verb "lobby" means, according to the Oxford English Dictionary (1933), "To influence (members of a house of legislature) in the exercise of their legislative functions by frequenting the lobby. Also, to procure the passing of (a measure) *through* Congress by means of such influence." Other dictionaries give similar meanings. The Supreme Court discussed a contract for "lobby service" in Trist v. Child and used the term "personal solicitation" as descriptive of it. "A lobbyist", said the Circuit Court in Burke v. Wood, "is defined to be one who frequents the lobby or the precincts of a Legislature or other deliberative assembly with the view of influencing the views of its members." * * * Congress was certainly aware of the common meaning of the words "lobbying activities" when it used them in conferring authority upon the Buchanan Committee. *At the most, the words depict no more than representations made directly to the Congress, its members, or its committees.*

At p. 176, he excludes pretty clearly from his definition the sending of communications to Congressmen in the following statement:

> Members of Congress need read only that which they want to read. The force behind the writing is the author, not the donor. And, moreover, the wastebasket is an invincible protector against harm by such means. *"Lobbying" by personal contact is a different and more dangerous activity.* (Italics added.)

And at p. 177 he clinches the point that his definition rejects any activities such as merely urging others to write their Congressmen about legislation, which do not involve personal approach to, or personal solicitation of, Congressmen as follows:

> If it be true that those who today would influence legislation *turn from the buttonholes of the legislators to the forum of public opinion for support,* a great good in the cause of representative govern-

> ment has been done. *The evil to be dealt with is at the buttonhole, not in the arena of political discussion,* whether that discussion be oral or written, over the air or on printed pages. These are basic principles of our concept of government. *If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of those principles, we will have lost parts of the foundation of the Constitution.* (Italics added.)

The Government, however, is irrevocably committed in its brief to the proposition that in accordance with this Court's decision in the *Rumely* case the activities of those who attempt to influence public thinking, even though excluded from this Court's definition of "lobbying", nevertheless are at the "core"—or the "traditional heart" of the commonly accepted meaning of the term, provided only that they conclude their exhortations with a request that those in the audience impart to their Congressmen their views on legislation.

Certainly nothing in the *Rumely* decision can be cited in support of this contention; it is, we submit, quite repugnant to this Court's definition of "lobbying" in the *Rumely* case; and even worse it strikes us at being at war with ordinary experience and sound sense.

The Government can scarcely be so naive as to honestly believe that anyone ever undertakes to influence public opinion on legislative matters entirely for the moral edification of his audience, or to raise the general cultural level, or to share with others his private utopian dreams, and this with utter indifference to whether his program is ever put into effect. Such a suggestion sounds ridiculous enough, but the Government's apparent distinction between those advocates of legislative programs who request their listeners to write to their Congressmen, and those who do not, with the consequence that the former are unquestionably within the Act, while the latter enjoy

some sort of uncertain status, indicates that the Government is here committed to such a view. What constitutes a request that a person write to his Congressman? Must it be explicit or, if not, is it enough for the speaker to hint, and in such event how strongly must be hint? At all events, what difference does it make when, as must be perfectly obvious to anyone not unacquainted with the most elemental facts of national life, the only purpose of *any* program or campaign to influence public opinion on legislative matters is to stir one's listeners up to bring to bear effectively upon the Congress the massed pressure of the public mind? So what the Government is really arguing here is that the Act applies to *all* efforts to influence public thinking on legislative questions— an area which we think the *Rumely* decision indicates clearly enough is beyond the reach of Congressional control.

Certainly the Government cannot here with good grace deny that the Lobbying Act applies to efforts on the part of private individuals to proselyte their neighbors and mold public opinion on matters of general interest. The contention that both the Act and the Resolution in the *Rumely* case did so apply, as we think sufficiently appears from the extracts just quoted, was one of the mainstay arguments of the Government in that case. Moreover, as has been shown, the statute appears inescapably to apply to such activities on its face and the statutory Three-Judge Court so indicated in the *N.A.M.* decision. (*infra*, at p. 96). And at all events the charges of the present Information against these defendants, accusing them repeatedly of attempting *to influence the opinions of private individuals*, even where a Congressman was not approached in any manner, surely ought to estop the Government to deny that the statute seeks to invade this forbidden field of legislative action. We think a few portions of this Information deserve requotation at this point.

We cite these charges only in order to point out their flat contradiction of any possible intimation of the Government's argument that this Act, as Congress has written it, does not attempt to restrict efforts to influence public opinion. And incidentally, they further, and on their face, flatly contradict the repeated asseverations of the Government's brief, that the Information charges nothing more (beyond personal solicitation of Congressmen) than requests by defendants that others write their Congressmen about legislative matters.

Thus the Court will recall that the Government here charges in Count V, subparagraph 2(a) (R. 11-12) as follows:

> 2. That • • • the defendant Ralph W. Moore for the purpose of influencing and attempting to influence the aforesaid legislation • • • made the following expenditures:
>
> (a) On or about November 7, 1949, to one C. C. Hanson, at Washington, D. C., in the sum and amount of $46.21 for the services of said Hanson in mimeographing 25 copies of a document sent to R. M. Harriss, New York at the request of the defendant James M. McDonald.

All persons referred to, of course, are private individuals; none is a member of Congress.

Further, as already noted, the Government is in this Information committed on the present record to the position that a person violates the Lobbying Act by failing to report expenditures incurred in conveying his views on public matters—*not* to the Congress—but *to the press*, i.e., it also charges Moore with failing to report an expenditure (Count V, sub-paragraph 2(c), (R. 12):

> (c) On or about November 20, 1947, to one C. C. Hanson, at Washington, D. C., in the sum and amount of $33.92 for the services of said Hanson, in preparing and sending out a press release, 50 copies of

> which said Hanson delivered at the National Press Club.

Finally, we again direct the Court's attention to subparagraph 6(d) of Count VIII of the present information (R. 19) which charges as follows:

> (d) On or about November 28, 1949, the defendant James E. McDonald, issued a press release in which he stated, among other things, "Government control of commodities is a dangerous thing."

The Lobbying Act, we submit, since it plainly on its face imposes conditions which restrict the public discussion by the American people of their national concerns—a construction repeatedly reached both by the courts and by the Government—manifestly violates the prohibitions of the First Amendment.

In several other respects the statute goes far beyond what might be necessary to correct the evils of "lobbying." For one thing, activities to influence legislation must be reported no matter how honest and direct they may be; and they must be reported, moreover, regardless of whether the person acts openly and frankly in his own interest or operates covertly and secretly through a concealed agent or in the interest of an undisclosed principal.

Finally, those to whom the statute is applicable must report all money received and expended, under a literal reading of Section 305, for all purposes, legislative or otherwise (see *supra*, pp. 51-53) no matter how small these items of receipts or expenditures may be. Nor can the Government well argue that the monstrous reach of the statute's envelopment is qualified by the *de minimus* rule. In view of the explicit terms of the Act itself, it forecloses any appropriate occasion for application of the *de minimus* doctrine. Section 305(a) says that "[e]very person receiving *any* contributions or expending *any* money" for the purposes referred to shall file the state-

ments thereafter enumerated. If Congress had wanted to peg the floor at $10 or $100 or $1000 it could easily have said so, and when it instead said "any money" it presumably meant just that. In any event Congress obviously meant to include sums of considerably less than $10 because Section 305(a)(4) requires a reporting of detailed information whenever expenditures *aggregating* $10 or more in one year are made to one person, and Section 305(a)(5) requires that the total of all sums of *lesser* amounts also be reported. In addition, Section 303(a) requires persons receiving contributions to keep a detailed account of all contributions "of any amount or of any value whatsoever." It is thus clear that the statute covers substantially every person engaged in serious pursuits; and that it exacts under penalty of fine, imprisonment and automatic deprivation of civil rights for a three-year period, the most personal, confidential, trivial and irrelevant information from any person who is unable to repress an active interest in the workings of the legislative branch of his Government.

The rule is well established that Congress cannot restrict any exercise of one of the basic freedoms unless such exercise presents a clear and present public danger. And every statute infringing upon those freedoms must be so narrowly drawn as not to result in any restriction which is not necessary to meet that danger. This Act infringes upon practically every exercise of the right to petition as well as upon the freedoms of speech, press and assembly. It visits with criminal penalties the exercise of the right which is perhaps above all others the most precious heritage of the people under the Constitution—the right to speak openly and freely on public questions without previous restraint or registration with functionaries of the Government. Nor are the requirements of the Act in any way limited to cases of corruption, deceit, or undercover practices. Open and direct as well

as secret and indirect influences are admittedly included. The statute requires those to whom it applies to report all exercises of First Amendment freedoms in connection with legislative matters, and this quite without regard to the nature, magnitude, or the triviality, of their activities. In so doing, it manifestly restricts a multitude of such activities which could not possibly present any clear and present danger to the legislative process, but which on the contrary are indispensably essential to the healthy functioning of that process—even to its ultimate survival—in our democratic system. On its face it stands as the most reckless, benighted and thoroughly vicious assault upon the freedoms of speech, of the press, and to petition the Government for a redress of grievances, that has ever emanated from any legislative body—state or federal—since the foundation of the Republic. And on its face, and as Congress has written it, this Court should strike it down.

E. **The question here is not whether Congress has power to regulate lobbying, but only whether the Lobbying Act on its face is unconstitutional.**

There has never arisen in this case any issue of the power of Congress to protect its legislative processes. Thus the Court is not confronted, as the Government appears to urge, with the abstract question of whether, without particular reference to the provisions of the present statute, Congress has the power under the Constitution to regulate "lobbying." Manifestly, the only question before the Court is whether the specific statute under which these defendants are charged violates the Constitution by reason of its vagueness and ambiguities and whether it unlawfully abridges the freedoms protected by the First Amendment. The Government's argument that it is within the constitutional power of Congress to regulate "lobbying", and also its apparent impli-

cations that if this particular statute should be stricken down, Congress will be powerless to control its legislative processes, are quite irrelevant to the questions now pending. For the Court to concern itself with any question of whether under the Constitution Congress can regulate "lobbying" at all would call for an advisory opinion on a matter not now pending before it, and from the earliest period of its existence this Court has consistently and very wisely abstained from rendering advisory opinions. The sole question, may we repeat, is whether the Federal Regulation of Lobbying Act, as that statute now stands before this Court, and as Congress has drafted it, is void for violation of the prohibitions of the Federal Constitution.

At pp. 68-69 of its brief, the Government cites a miscellany of irrelevant statutes apparently to indicate by the road of "analogy" that Congress has power to enact some sort of a statute requiring lobbyists to disclose certain information. There is passing reference to such laws as the Corrupt Practices Act, libel and slander laws, a statute requiring information of holders of second class mailing privileges, the Hatch Act, the Smith Act, the sedition statute, the non-Communist affidavit provision of the Labor Management Relations Act, the National Labor Relations Act, the Foreign Agents Registration Act, and the Sherman Antitrust Act. The short answer is that if the Government seeks thereby to establish as an abstract proposition that Congress, within the limits of the Constitution, has the power to regulate lobbying without regard to the specific provisions of the present law, the Government has given itself a great deal of trouble to establish a proposition that would be universally conceded. Compare the following observation from *Dennis v. United States*, 341 U.S. 494, 501 (italics the Court's):

> No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow

> the Government by force and violence. The question here is not whether Congress has such *power,* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

We forbear to weary the Court by any minute inspection of this immense parade of unrelated statutes. But the caliber of the parallels may be gauged by examining only a few. The Government, in citing the libel and slander laws (p. 69) exposes its failure to inform itself that these statutes have from the earliest time of our history been recognized as falling within the exceptions to the prohibitions of the First Amendment, e.g., *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, at 571-572:

> There are certain well-defined and narrowly limited classes of speech, the punishment of which has *never* been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, *the libelous,* and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (Italics added.)

And with respect to the Government's citation (p. 73) of *Associated Press* v. *United States,* 326 U. S. 1, in which it was held that newspapers are subject to the antitrust laws, it may be of interest to point out that this same decision was cited to Judge Prettyman in *Rumely* v. *United States,* 197 F. 2d 166 (affirmed, *United States* v. *Rumely,* 345 U.S. 41), and that he disposed of it (at p. 177) with the following comment:

> Of course the publishers of books are not immune from law. This is the purport of the cases holding publishers and news agencies subject to laws of vari-

ous sorts. [Citing the *Associated Press* case in a footnote] That is not the problem before us. Here the power claimed by the Committee is a power to inquire into the sale of books because those books attempt to influence public opinion. In its opinions dealing with regulations imposed upon the press, the Supreme Court has been most careful to point out that the regulations upheld did not bear upon the freedom of publication except to the extent that ordinary business burdens bear upon the publishing business.

As to the Government's quotation (pp. 72-73) of the dissenting opinion of Mr. Justice Black in *Viereck* v. *United States,* 318 U.S. 236, 251, one answer, of course, is that a dissenting opinion is not the opinion of this Court. But the conclusive answer is that Mr. Justice Black's views on the registration of agents of alien enemies are one thing, and his views as to Congressional attempts to impose restrictions upon efforts to influence public opinion in violation of the First Amendment, are something else again. For the latter, see the concurring opinion of Mr. Justice Douglas in *United States* v. *Rumely,* 345 U.S. 41, 48-58, in which Mr. Justice Black concurred, and which is quoted, *supra* at p. 36.

Upon reading this section of the Government's brief we were not a little dismayed to find that the Justice lawyers had thus lumped together indiscriminately, persons under the Lobbying Act and agents of enemy aliens. The sensibilities of Representative Sumner were not so obtuse. In a statement which indicates that she was one of the few members of Congress who had any adequate conception of what it was doing when it enacted this law, she addressed the House during the debate on the bill as follows (92 Cong. Rec. 10091):

> Mr. Chairman, in my opinion, *we are violating the Constitution.* It is directly implied in the Constitution that we have no right to intimidate people or to

make any effort to intimidate them so that they cannot petition the Congress. What is this but intimidation? *It is the same sort of curb you put on enemy agents during the war. Registration—do you remember? It is the same sort of curb you put on enemy agents during the war.*

Mr. Chairman, this is not intended to prevent corruption. It would be very simple to put in here language providing for a heavy fine or a heavy jail sentence for anyone who tried to bribe or who offered a job to a Congressman or indulged in any of the ways that are known as corrupt. If that were the intention it would be the easiest thing in the world to insert language in this section. You can see what this is. * * * Mr. Chairman, *the people are going to soon rise up and stop this totalitarian way into which the Government has fallen recently.* (Italics added.)

F. The statute cannot be defended on the ground that it does not in terms absolutely prohibit the exercise of First Amendment freedoms but requires only a disclosure of information when such freedoms are exercised.

The Government's brief (pp. 65, 67) refers to the Lobbying Act as "a mere disclosure statute" and argues that in consequence it cannot be said unlawfully to abridge First Amendment freedoms. The Government points to the fact that once a person registers and files the requisite information he is free to say what he pleases. But while the Act does not in terms prohibit the exercise of those freedoms, it does impose a definite condition upon their exercise, and it is therefore unconstitutional under the decisions of this Court.

Section 308 provides that anyone who is paid for the purpose of attempting to influence legislation shall "before doing anything in furtherance of such object" register and give detailed information. Section 305 has

the same effect. It provides that the persons covered shall file detailed quarterly statements. Any person to whom the statute is applicable and who does not file such statements has violated the statute and is subject to its severe penalties. Thus a person who desires to engage in the activities covered by the statute has two alternatives—to file, or to forego such activities and not file. But if he exercises his right of free speech or his right to petition Congress, he must file. Obviously, therefore, the filing requirement is a *condition* upon the exercise of First Amendment rights. And as such, it is a *restriction* upon the exercise of those rights.

Apparently it is the Government's view that such a *restriction*, since it falls short of a *prohibition*, is not an abridgment within the terms of the First Amendment. But the Amendment forbids *restrictions* as well as *prohibitions*. There are the following several conclusive answers to the Government's argument:

(1) *This Court Has Squarely Held That Such Restrictions on First Amendment Rights Are Invalid.*

The recent decision in *Thomas* v. *Collins*, 323 U.S. 516, completely disposes of the Government's argument. There a Texas statute required all labor organizers to register before soliciting memberships—giving name, union affiliations, and credentials. Upon such registration the Secretary of State was *required* to issue an organizer's card. The Court held that, as applied to one who made a speech to an assemblage of workers during which he invited his listeners generally to join a union, the statute was unconstitutional because its practical effect was to restrict the right to speak in favor of unionism. The state sought to defend the statute on the ground that it "is merely a previous identification requirement" (p. 538) since the Secretary of State could

not refuse a card but *had* to issue it upon registration. The Court held, however, that such an identification requirement was a *restriction* upon freedom of speech and therefore unconstitutional, saying (pp. 539-540, 543, italics added):

> *As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.* Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution *as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.* * * *
>
> *If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them* and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. *We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.* * * *
>
> The restraint is not small when it is considered what was restrained. * * * If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no

> more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

The principle was recently restated in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 402:

> * * * the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.

The principle of these cases is squarely applicable here. It could not be made unlawful for one to speak freely on national questions or openly and frankly to petition Congress for a redress of grievances. Nor can this be accomplished by requiring the filing of statements as a condition to the exercise of that right, and making failure to meet that condition punishable by criminal penalties. If necessary to protection against a clear and present danger, Congress can either condition or prohibit the exercise of these rights. But where no such need exists, Congress can neither condition nor prohibit. Unjustified infringement is not made valid because it is in the form of regulation or restriction or a condition imposed upon the exercise of those rights, rather than outright prohibition. Where no Congressional action is necessary to prevent a clear and present danger, the freedoms are immune from *any* restriction. As said in the *Thomas* case (p. 539), "a requirement of registration * * * would seem generally incompatible with an exercise of the rights." And again (p. 543), "The restraint is not small when it is considered what was restrained."

(2) *The Restriction Here Is Made More Serious by Virtue of the Vagueness of the Statute and the Severity of Its Penalties.*

The extreme vagueness of the statute and the severity of its penalties materially increase its restraint upon the exercise of First Amendment freedoms. By virtue of the vagueness and the ambiguities of the statute above discussed, no person can know whether or not he is engaging in an activity which falls within its terms. If he takes any part in public affairs or expresses his views thereon but fails to file because his guess was wrong, he is subject to a year's imprisonment and a $5000 fine and, additionally, an automatic mandatory three-year proscription of his most cherished civil liberties. In consequence, one who desires to engage in any activity which a jury might later be persuaded to imagine was somehow related to legislation will respond to this threat by reporting it, however remotely removed it may be from any permissible area of national regulation, and thereby submit to the imposition of an unlawful restraint upon the exercise of his inviolable constitutional rights. And any person, on the other hand, wishing to *avoid* identifying himself as a "lobbyist" and filing the oppressively detailed statements, will scrupulously abstain from any activity which could possibly be associated with legislative matters. The Court anticipated this evil dilemma in *Thomas* v. *Collins*, 323 U.S. 516, when it held that a statute requiring registration as a condition to issuing a general invitation to join a union was a restriction of free speech, because of the impossibility of distinguishing between such a invitation and a general speech lauding the union. The Court emphasized the withering of free expression that inevitably results from the overhanging threat of criminal prosecution against all who overstep a shadowy lir (pp. 534-536, italics added):

> That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words "solicit", "invite", "join". It would be impossible to avoid the idea. • • •
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or *restrains discussion* which is not or may not be invitation. *The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause.* The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card.

The effect of the present statute is quite indistinguishable. No one who has failed to file the necessary statements can feel free to engage in any activity remotely connected with legislation. And persons unwilling to report will, by the same token, feel compelled to abstain from activities in any way related to legislative matters. Thus in a very real and practical sense the statute *prevents* the free exercise of civil rights.

(3) *The Statutory Condition of Registration As a "Lobbyist" Is Uncommonly Well Adapted to Prevent the Exercise of First Amendment Freedoms Because of the Moral Stigma that the Public Mind Attaches to the Term.*

The restraint here is more serious than that held fatal in the *Thomas* case. There the statute demanded identification of individuals as "labor organizers". Here the Act requires those covered to identify themselves publicly as "lobbyists" and to file detailed statements of their finances. It is, we think, a commonplace of observation that to a great number of American people the term "lobbyist" carries inseparable connotations of shady deals, deception, and even of corruption—a condition which did not go unnoticed by those responsible for this legislation. Congressman Dirksen, a member of the Joint Committee on the Organization of Congress which recommended the statute and co-manager of the bill in the House, said on the floor (92 Cong. Rec. 10090):

> It is not the desire of the Committee to place upon any citizen a brand that is sometimes regarded as sinister.

On other occasions, Members of Congress have formulated in the most vehement statements the public feeling that "lobbying" is an activity often deeply tainted with crookedness and graft, e.g., from Senate Report No. 342, 70th Cong., 1st Sess., p. 2 (1928):

> These associations include fake agricultural associations, fake scientific associations, fake religious associations, fake temperance associations, fake associations in opposition to prohibition, and, in fact, nearly every activity of the human mind has been capitalized by some grafter with "headquarters" established for this activity in Washington. The only activity in fact engaged in is to extract money from credulous people and put it into their own pockets.

And at p. 3:

> If these people may be compelled to put their names on record it will then purify the atmosphere their presence pollutes.

Under the Lobbying Act, the most corrupt and sinister lobbying activities and the most public-spirited championship of American ideals are all tarred with the same brush. As stated in Senate Report No. 1400 (79th Cong., 2d Sess., p. 27 and quoted with approval at pp. 31-32 of the Government's brief) the Act was intended to include three types of lobbyists: (1) "Those who do not visit the Capitol but initiate propaganda from all over the country * * *" (2) "* * * those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress" and (3) "* * * *entirely honest and respectable representatives of business, professional and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation* * * *" (Italics added.) Thus the Act threatens with fine, imprisonment and mandatory deprivation of First Amendment rights "entirely honest and respectable representatives of business, professional and philanthropic organizations * * * who openly and frankly * * * express their views for or against legislation * * *" unless they acknowledge in a writing filed as a public record (and, as experience under the Act has shown, periodically published in the newspapers) that they are precisely in the same statutory category with "lobbyists" of the most sinister, corrupt, and depraved variety. One may search the required forms of registration and reports in vain for any indication of whether the registrant is a good lobbyist or a bad lobbyist, and the public mind at all events is not highly discriminating.

This is by no means an illusory restraint. Any person, jealous of his good reputation in the community, who might otherwise take an active interest in federal legislation, will long hesitate to do so at the expense of compromising his good name, or at least of having his name recurringly placarded in the newspaper lists along with the rest of the "registered lobbyists". Indeed, persons desirous of petitioning their Congress might well forego that right rather than brand themselves as lobbyists. It is this type of restraint which the First Amendment was designed to prevent. The intendment of that provision is that all persons are to be absolutely free to speak their minds and carry their grievances to their Government. Any legislative action which dissuades persons from the proper exercise of those rights, because of fear of public reproach or otherwise, is a direct abridgment of those rights and therefore unconstitutional.

(4) *The Restriction Here Is Particularly Serious Because of the Expense and Effort Entailed in Preparing the Reports Required by the Statute.*

The statute in the *Thomas* case required only a statement of name, labor union affiliations, and credentials. But here the Lobbying Act imposes reporting requirements incomparably more onerous and oppressive. Section 305 requires quarterly statements showing (1) the name and address of each person who has made a contribution of $500 or more, (2) the total sum of *all* contributions, (3) the name and address of each person to whom expenditures totaling $10 or more during the calendar year have been made, and the amount, date and purpose of such expenditures, and (4) the total sum of *all* expenditures. And as already noted (*supra*, pp. 70-71) the reports required are not limited to statements of receipts and expenditures having a relation to legislative activities; a person under the literal language of the section must re-

port *all* his receipts and *all* his expenditures, without any limitation whatever as to their purpose or their amount. Some registrants have so construed it, and have filed accordingly, as Congressman Buchanan advised the House (see *supra*, p. 52). Further, Section 303 requires persons who receive contributions for legislative purposes to keep detailed accounts of (1) all contributions of any amount, (2) the name and address of each person making any contribution of $500 or more, (3) all expenditures made, (4) the name and address of every person to whom any expenditure has been made. It also requires that receipted bills be kept showing the particulars of every expenditure exceeding $10. Paragraphs (1) and (3) of Section 303(a) call for reports of all contributions and all expenditures, without reference or limitation, express or implied, to their having been made for legislative purposes. Section 308 requires registration statements and quarterly reports giving information substantially as detailed as that prescribed by Section 305, although in some respects different in content. It does, however, stand in striking contrast to Sections 305 and 303, in that the reports of receipts and expenditures required under Section 308 are limited to those arising out of legislative activities, thereby confirming the Congressional intention that reports under other sections should *not* be so limited.

The burden imposed by these requirements obviously adds to the weight of the restriction on First Amendment freedoms. A person desiring to publish an article or sponsor a speech having some connection with legislative matters might well refrain from such an exercise of his rights because of the expense and effort involved in filing so detailed a statement. Or one contemplating a visit with, or communication to, his Congressman, in his own self-interest or otherwise, might be deterred by the necessity of filing a statement showing, at the very least,

the cost of a telegram or his transportation costs, or, if the reporting requirements of Section 305 are applied literally according to their plain terms, and without judicially created qualifications, *all* of his receipts and *all* of his expenditures of every kind or character, regardless of their purpose and whether or not related to legislative matters. The seriousness of the restraint is thus aggravated by the consideration that persons will often be dissuaded—indeed persons fully cognizant of the reporting requirements and penalties of the Act would almost invariably be dissuaded—from exercising their First Amendment rights because of the expense and effort entailed in complying with the statute.

G. By reason of its total deprivation of First Amendment rights for a period of three years, Section 310(b) violates the First Amendment on its face, and the District Court's determination that it is unconstitutional on its face should be affirmed.

The District Court (R. 39-40) applied to Section 310(b) the ruling of the Three-Judge Court in the *N.A.M.* decision (*infra*, pp. 91-98) that this penalty provision violates the First Amendment on its face, to wit (*infra*, pp. 97-98):

> Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than $5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a Committee of the Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.
>
> Freedom of speech and the right of the people peaceably to assemble and to petition the Government

for redress of grievances are guaranteed by the First Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307, inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

And in the present case the District Court, applying this ruling of the *N.A.M.* decision, additionally held Section 308 unconstitutional for the same reason (R. 40). Furthermore it declared (R. 39): "The Court does not agree that the separability clause goes far enough to make it possible to cut the penalty clause in two." We cannot see how any other determination would have been possible, and we agree with the Three-Judge Court that "It is inconceivable that anyone would argue in support of the validity of such a provision."

The criticism of this decision appearing at pp. 75-80 of the Government's brief is frivolous to a degree. First, the Government urges this Court, in necessary effect, to refuse to decide whether or not 310(b) is constitutional, but, on the contrary to *assume* that it is *unconstitutional*, and then, proceeding from that assumption, to *decide* that it is *severable*, i.e., at p. 76 the Government says:

> In our view, it is not necessary to decide whether Section 310(b) is constitutional. The District Court's holding that Sections 305 and 308 of the Act are invalid because of the penal provisions of Section 310 (b) was clearly wrong in the face of the separability clause * * *

A suggestion so palpably absurd hardly deserves a serious answer. Until the Court decides that Section 310(b) is unconstitutional, the question of whether it is severable is *moot*, and of course this Court, as the Government itself stoutly affirms in other portions of its brief, does not decide moot questions, e.g., at page 81 of its brief:

> The Court has repeatedly announced that it does not pass on issues * * * until they inescapably come before it in concrete form * * * the Court [does not render] advisory opinions on hypothetical cases * * *

And the Government's solicitude to avoid any ruling by this Court on the constitutionality of Section 310(b) could only have arisen, we think, from its own conviction that the section is unconstitutional. Indeed, when a statute flatly prohibits the exercise of the very rights whose mere *abridgment* is proscribed by the First Amendment, how could any Court hold otherwise?

It is to be noted that the Government does not even undertake to defend the section on the basis of the clear and present danger principle, nor could it. What clear and present danger is presented by any person's exercising his First Amendment freedoms of free speech and to petition his Government, notwithstanding he has been convicted of violating the Lobbying Act?

As stated, the Government is primarily anxious to stave off any ruling by this Court on the constitutionality of Section 310(b), and to this end it next cites *United States* v. *Wurzbach*, 280 U.S. 396 for the proposition (p. 77) that, "The contention that a penalty is improper cannot normally be made by one against whom the pen-

alty has not been imposed." The Government seems to say, in other words, that these defendants will have to await being sentenced, and by the same token being automatically deprived of their First Amendment freedoms for a three-year period before they can claim standing even to question the constitutional validity of Section 310(b). But in the *Wurzbach* case the Court only held that, the remainder of a statute being constitutional, the question of uncertainty as to what penalty provision was applicable could await the time when the penalty was to be applied. It has no relevancy here. We do not here attack the penalty as uncertain; we attack it on the same ground that the District Court struck it down; because it stands on its face in violation of the prohibitions of the First Amendment.

It is almost incredible that the Government should characterize Section 310(b), as it does at p. 77 of its brief, as a "minor penalty". Then apparently in support of that assertion it argues at pp. 79-80, in effect, that 310(b) may not be as bad as it sounds, and in any event it is not much worse than some other penalties. At pp. 79-80 it says "* * * the prohibition on appearances before a Congressional committee can *easily be read* as referring to paid appearances on behalf of others and not to appearances in one's own behalf." (Italics added.) "Easily be read" by whom—a man of common intelligence? Nothing in the section even remotely indicates such a construction, and if it can "easily be read" to mean that it can just as easily be read to mean anything else that a lively imagination might suggest. But even as so "read", we do not see that its bald violation of the First Amendment is tempered in any degree.

"So interpreted," the Government continues at p. 80 of its brief,—"So interpreted, Section 310(b) does not appear very different from the temporary suspension of

the professional license of a lawyer, accountant, or doctor for some misconduct or failure to abide by a statutory requirement." Is it then the position of the Government that the constitutional rights of the people to speak freely and to petition their Government are enjoyed only at the sufferance of the legislature, and that these rights may in consequence be licensed by the Congress? See the concurring opinion of Justices Douglas and Black in the *Rumely* case (quoted *supra* at p. 36).

This Court should affirm the holding of the Court below that 310(b) violates the First Amendment on its face and, being unseverable, renders the entire statute unconstitutional.

CONCLUSION

The District Court's decision was right, and in affirming it this Court should hold the Lobbying Act invalid on its face and as a whole for violation of the Federal Constitution.

Respectfully submitted,

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APPENDIX

Opinion of United States District Court for the District of Columbia in National Association of Manufacturers vs. J. Howard McGrath, March 17, 1952

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103 F. Sup. 510.

(Appeal Dismissed Supreme Court No. 174, October 13, 1952

Rehearing Denied November 18, 1952)

Before Wilbur K. Miller, Circuit Judge; Henry A. Schweinhaut and Alexander Holtzoff, District Judges.

Holtzoff, District Judge: This action is brought by the National Association of Manufacturers of the United States and one of its officers against the Attorney General of the United States, to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act (Act of August 2, 1946, secs. 302-311, 60 Stat. 839; 2 U.S.C.A. secs. 261-270). The basis of the action is twofold: first, that the Act is unconstitutional; and, second, that even if valid, it is not applicable to the plaintiffs.

The Act may be divided into two parts: first, all persons, except political committees, who directly or indirectly solicit, collect, or receive money to be used principally to aid, or whose principal purpose is to aid in the passage or defeat of any legislation by the Congress of the United States; or to influence, directly or indirectly, the passage or defeat of legislation by the Congress of the United States, are required to keep a detailed and exact account of contributions and expendi-

tures with receipted bills, and to file with the Clerk of the House of Representatives quarterly statements listing contributions and expenditures (Secs. 303-307).

The second part of the Act requires persons who engage for pay, or for any consideration, to attempt to influence the passage or defeat of legislation by the Congress of the United States, to register with the Clerk of the House of Representatives and with the Secretary of the Senate, and to file certain quarterly reports (Sec. 308). These two parts of the Act are severable. The second is not involved in this action.

It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions.[1] Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity. For this reason, the Court will not consider the contention that on the factual situation presented by the evidence, consisting of lengthy depositions and voluminous exhibits, the plaintiff Association is not subject to the terms of the statute. This is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted.

On the other hand, an exception to the general principle is at times made if it is contended that the statute is unconstitutional and the consequences of a violation may be unusually serious, possibly resulting in irreparable damage.[2] For example, in this case if the statute

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[1] *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. *Cave* v. *Rudolph*, 53 App. D. C. 12, 15.

[2] *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 163 *et seq.*; *Truax* v. *Raich*, 239 U. S. 33, 37-39; *Adams* v. *Tanner*, 244 U. S. 590; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Packard* v. *Banton*, 264 U. S. 140, 143; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451-2; *Parker* v. *Brown*, 317 U. S. 341, 349-350; *Hynes* v. *Grimes Parking Co.*, 337 U. S. 86, 98-100.

is valid and the Association erroneously determines that it is not subject to its provisions, it may be liable to a penalty, not only of a fine, but of a proscription for a period of three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation by the Congress. The Court is of the opinion that this case is within the exception insofar as concerns the contention that the pertinent provisions of the statute are unconstitutional. Accordingly the Court will in this action pass upon the validity of these provisions.

The Government has raised the question whether the plaintiffs are in a position to maintain this action on the ground that no prosecution has, as yet, been threatened. A great deal of testimony has been taken on this issue. The Court finds that such a prosecution has, in fact, been threatened, even though the threat has not been made formally.

The vital provision of the pertinent portions of the statute (Sec. 307) makes its requirements applicable to any person who, by himself or through any agent or employee, or other persons, in any manner whatsoever, directly or indirectly, solicits, collects, or receives money to be used principally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress, or to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States. It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action, or failure to act, is prohibited. A criminal statute which does not comply with this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle in our constitutional system, since without it, it would be

possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden.

For example, in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, the Court passed upon the validity of a Kentucky statute, which made certain combinations for the purpose of controlling prices lawful, unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The Court held that the statute offered no standard of conduct and was, therefore, invalid.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89, the Court held unconstitutional an Act of Congress, which made it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. This result was reached on the ground that no definite standard of conduct was prescribed by the statute.

In *Connally* v. *General Const. Co.*, 269 U. S. 385, 391, the Court considered an Oklahoma statute, which provided that all persons employed by or on behalf of the State shall be paid not less than the current rate of per diem wages in the locality where the work is performed. It was held that this statute was repugnant to the due process clause of the Fourteenth Amendment on the ground that the phrase "current rate of wages" and the word "locality" were indefinite and ambiguous. The Court summarized the pertinent principles as follows:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague

that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 456, the Court struck down a State statute, which declared all combinations to be against public policy, unlawful and void, except those whose object and purpose was to conduct operations at a reasonable profit or to market at a reasonable profit those products which otherwise could not be so marketed. The Court reached the conclusion that this statute involved so many factors of varying effect that one could not decide in advance whether any proposed action on his part would violate it.

In *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242, the Court held invalid a statute, which prohibited production of crude oil in such manner and under such conditions as to constitute waste. The Court referred to the fact that the general expressions employed were not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, the Court had before it a New Jersey statute to the effect that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, is declared to be a gangster. The Court held that the words "gang" and "gangster", and the phrase, "known to be a member", were ambiguous and so vague, indefinite, and uncertain as to render the statute repugnant to the due process clause of the Fourteenth Amendment.

In *Winters* v. *New York*, 333 U. S. 507, a New York statute which punished any one who published, sold, distributed or showed, or had in his possession, with intent

to sell, distribute or show, any printed paper principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime, was deemed not to meet the required standards and not to contain ascertainable standards of guilt. The Court concluded that the statute was violative of the due process clause of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, passed upon a statute imposing penalties on any street railway company in the District of Columbia, that failed to supply and operate a sufficient number of cars, to all persons desirous of the use of said cars, "without crowding said cars". The Court held that the statute was unconstitutional, as the phrase "without crowding" was too uncertain and indefinite to constitute an ascertainable standard of guilt. It pointed out that the dividing line between what is lawful and unlawful may not be left to conjecture.

Applying the foregoing doctrine to the instant case, the conclusion is inescapable that Sections 303 to 307 are invalid. The clause, "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indirectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the

meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.

What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.

We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than $5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a Committee of Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.

Freedom of speech and the right of the people peaceably to assemble and to petition the Government for redress of grievances are guaranteed by the First

Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307, inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

Accordingly, we hold that Sections 303 to 307, inclusive, of the Act are unconstitutional. We regard Section 308 as severable and we, therefore, do not express any opinion as to its validity, because that question is not involved in this litigation.

A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted.